

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Newport News Division

JOANN WRIGHT HAYSBERT,

Plaintiff,

v.

BLOOMIN' BRANDS, INC., AND  
OUTBACK STEAKHOUSE OF FLORIDA,  
LLC,

Defendants.

CIVIL ACTION NO.  
4:20cv121

TRANSCRIPT OF PROCEEDINGS

DAY 1

Norfolk, Virginia

August 8, 2023

BEFORE: THE HONORABLE REBECCA BEACH SMITH  
United States District Judge

APPEARANCES:

CRANDALL & KATT

By: David A. McKelvey

And

HAYSBERT & MOULTRIE LLP

By: Nazareth M. Haysbert

Counsel for the Plaintiff

1 APPEARANCES CONT'D:

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McGAVIN, BOYCE, BARDOT, THORSEN & KATZ, P.C.

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By: John D. McGavin

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Emily Blake

Counsel for the Defendants

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1 (Hearing commenced at 11:01 a.m.)

2 THE CLERK: In case number 4:20cv121, JoAnn Wright  
3 Haysbert versus Bloomin' Brands, Inc., and Outback  
4 Steakhouse of Florida, LLC.

5 Mr. McKelvey, is the plaintiff ready to proceed?

6 MR. McKELVEY: Yes, ma'am.

7 THE COURT: Mr. McGavin, are the defendants ready  
8 to proceed?

9 MR. MCGAVIN: Yes. Good morning, Your Honor. I'm  
10 John McGavin. I'm here on behalf of defendants. Also  
11 seated with me at counsel table is Emily Blake, who has  
12 entered an appearance in this case, and Ray Graham, who is  
13 our corporate representative for these proceedings.

14 THE COURT: All right. Well, good morning to all  
15 three of you.

16 Good morning, Mr. McKelvey.

17 MR. McKELVEY: Good morning, Your Honor.

18 THE COURT: Mr. Haysbert is walking in now, so you  
19 can note his presence. He wasn't here when we started the  
20 court and called the case.

21 Counsel, the first thing that we are going to take  
22 up this morning will be the outstanding motion involving  
23 Dr. Haider because that needs to be resolved before we can  
24 proceed with trial, because we need to know who the  
25 witnesses are going to be and how they are going to be

1 presented. So I believe, Mr. McKelvey, Mr. Haysbert, it is  
2 your motion, and you may come up to the podium and argue it  
3 to the Court.

4 MR. HAYSBERT: Good morning, Your Honor. My  
5 apologies for my delay. I was in the restroom upstairs.

6 THE COURT: Good morning.

7 MR. HAYSBERT: So the motion before the Court now,  
8 and I apologize, we had the final status conference on  
9 August 1st. I was under the impression that my expert  
10 witness would be there, and she gave me no indication that  
11 she would not.

12 But what I didn't know at the time, and what she  
13 didn't tell me until after, was that on July 24th, her  
14 father was admitted to the hospital, and he wasn't released  
15 from the hospital until the day after the final status  
16 conference, which is August 2nd, and that she is responsible  
17 for his end-of-life care, and his oxygen levels were  
18 dropping.

19 If you recall earlier this year, Your Honor, I  
20 stipulated to the extension of the trial date because I had  
21 an uncle who was very ill, he died in my presence, and when  
22 I was there with him in the hospital room, I know the  
23 feeling of seeing someone's oxygen levels go down as they  
24 are preparing for the end of their life. So it is my  
25 understanding that he is at the end of his life, and that

1 she needs to be near him to take care of him until his death  
2 or if he fully recovers. But she said he is out of the  
3 hospital, his oxygen levels are dropping, and that if they  
4 were to get to a certain level, he would have to be  
5 readmitted. He was admitted initially to the hospital  
6 because of pneumonia that turned into a respiratory failure.

7 So, Your Honor, I just wanted to say this final  
8 thing. Dr. Haider says she is willing to come in on the 9th  
9 or the 10th at your discretion. I did put the exact time in  
10 the motion, not that we have to adhere to that time, but  
11 just that if the Court wanted her to be at a certain time,  
12 she can be there, and that's the time that she could commit  
13 to. But whatever time is necessary, we are happy to do it  
14 for her.

15 THE COURT: Well, first of all, I would have  
16 certain questions because the rules are very strict in this  
17 regard. Rule 43 of the Federal Rules of Civil Procedure  
18 specifically state that testimony must be taken in open  
19 court, and, of course, any exceptions that were there  
20 through the pandemic are no longer in place.

21 But I would also tell you that even during the  
22 pandemic, this Judge did not take testimony by zoom in  
23 trials because it's very important for the trier of fact to  
24 observe the witness so that they can then determine the  
25 credibility, and it's something that to do in person is very

1 important because you can look at the body language, you can  
2 look at the contact, eye contact. But, in any event, this  
3 is not something that this Judge has allowed during a trial,  
4 a jury trial, and the only time it has been allowed was when  
5 it was for a motion, and in a criminal case, and the expert  
6 that they had on the matter was actually expected to die any  
7 minute. So it was the witness who was the individual.

8 I don't recall taking, and if I have, I'm not aware  
9 of taking any testimony by zoom during a jury trial, and the  
10 only time, that I recall, was during a hearing before the  
11 Court only.

12 But, in any event, I just want that to be clear,  
13 because this is not a situation where this request is being  
14 treated any differently than any other request that comes  
15 before the Court. That's the first thing I wanted to note.  
16 The second is, is that the exceptions, it says here that the  
17 only exceptions are a federal statute, the Federal Rules of  
18 Evidence, these rules, or other rules adopted by the Supreme  
19 Court that provide otherwise. Then it says for good cause  
20 and compelling circumstances and with appropriate  
21 safeguards, the Court may permit testimony in open court by  
22 contemporaneous transmission from a different location.  
23 That has been interpreted by the courts, and it's been  
24 interpreted very strictly by the courts. I've got this to  
25 give to everybody because it is filed court only under seal,

1 and at a threshold level, I know you've got a copy of the  
2 filing that was made last night for the electronic  
3 equipment. Yes, it was made yesterday morning at 6:05 a.m.  
4 The Court endeavored to write a lengthy reason for its  
5 denial. One of the matters that was mentioned in here but  
6 not ruled upon, and, again, these are always filed court  
7 only under seal, and they go back to the individual who has  
8 made the request.

9 I do have one, and this is a court only document,  
10 if you would please give this to Mr. McGavin and Ms. Blake,  
11 because it does have a lengthy statement of reasons in  
12 there. It goes to Mr. McGavin. Mr. Haysbert has already  
13 received it. He had it e-mailed to him as soon as the Court  
14 had finished the product, because it does have lengthy  
15 reasons in there.

16 Normally, it's just a form that is approved or not  
17 approved by the Court and goes back by e-mail to the counsel  
18 who has filed it. Mr. McKelvey filed one on behalf of you  
19 and your team back in July, and that's mentioned. A laptop  
20 was approved, the same as Mr. McGavin filed, and it was the  
21 same approval for a laptop and the use of the Court's  
22 evidence presentation system. That's what the defendants  
23 filed, was approved. That's what Mr. McKelvey filed, and  
24 that was approved.

25 I would note that I do believe that local counsel

1 is supposed to be signing the pleadings when they are coming  
2 into the Court. I haven't checked, so much has been coming  
3 in, but, Mr. McKelvey, you are local counsel, and you are  
4 responsible to the Court. That's why we have local counsel.  
5 I'm quite disappointed that it appears that you have not  
6 been actively participating in this case or actively giving  
7 guidance to out-of-town counsel because we keep getting  
8 filings that are coming from Mr. Haysbert. That's fine, but  
9 they need to be also signed and coming from you. Do you  
10 understand?

11 MR. MCKELVEY: Yes, ma'am.

12 THE COURT: I'm going to continue in a minute.  
13 Going back to the reason why we got off on this is because  
14 that particular statement of reasons, it's lengthy. It  
15 particularly mentioned, is it Haider, is that the way the  
16 doctor says her name?

17 MR. HAYSBERT: Your Honor, sometimes I mess it up  
18 myself. I think it's Dr. Haider.

19 THE COURT: Haider?

20 MR. HAYSBERT: Correct. It's sort of in between.  
21 I think that will be fine.

22 THE COURT: It is addressed on Pages 3 and 4. The  
23 reason I do it is because there are case cites in those  
24 reasons. I did say I was not going to address it in this,  
25 and that's why we are here this morning, but that it did



1 cite case cites in there. So there are a number of  
2 questions that aren't answered and aren't presented through  
3 affidavit. Just at a threshold level, how old is the  
4 father? Where does he live? Is he hospitalized where  
5 Dr. Haider is? Is he in Houston? Where is he? I don't  
6 know where he is. I don't know how old he is. I don't know  
7 where he's hospitalized. There is no indication whether he  
8 has a spouse, a partner, siblings, other children, other  
9 relatives, whether somebody in Dr. Haider's position has  
10 money for a caretaker. There are no medical records.

11 In these particular cases, you submit a medical  
12 record to verify what the person has said. They are filed  
13 under seal, obviously. We don't file people's medical  
14 records or anybody in open court. Here it's just a  
15 statement with no indication. He went into the hospital in  
16 July, and he came out, when was it.

17 MR. HAYSBERT: August 2nd.

18 THE COURT: So there is none of that information.  
19 The other is, you said you were planning to have her here.  
20 Well, where are the reservations? Something that  
21 Mr. McGavin mentioned, where are your plane reservations?  
22 There would be a confirmation of those. Where are your  
23 hotel reservations? There would be a confirmation of that.  
24 Where is your correspondence as between you and the doctor  
25 regarding her appearance and whether she can be here?

1 That's something that there is no record of. It is just  
2 somebody saying my father is ill, very ill, I'm the  
3 caretaker, and I can't be there. So it's your expert. You  
4 mentioned the subpoena.

5 The other thing is subpoenas only are good within  
6 100 miles. A subpoena from this court cannot compel  
7 somebody to come to court when it's more than a distance of  
8 a hundred miles. That's right in the federal rules. I  
9 didn't see any signed subpoena. So if she was subpoenaed,  
10 and, number one, she is your expert, you shouldn't have to  
11 subpoena her. It should be part of your agreement with the  
12 expert. I don't know. You mentioned a subpoena, but there  
13 is no signed subpoena. Even if there is a subpoena, it  
14 really is hard to enforce a subpoena that is more than a  
15 hundred miles. That's a problem that individuals have.

16 If there is an indication they're not going to be  
17 here, then at least the other side would have had an  
18 opportunity, if they so elected. There's been no notice  
19 that this person wasn't going to appear, and they elected  
20 not to take her deposition. They apparently didn't find  
21 anything, as they represented I believe at the conference on  
22 August 1, they didn't see any need to take her deposition.  
23 They looked at a report. The report didn't bother them, or  
24 for whatever reason, and they had that ability. You can't  
25 just try a case at the 11th hour or by ambush, not in

1 federal court.

2           So then we move from those things that I've  
3 mentioned to you to the caselaw. The caselaw is very  
4 specific when it talks about the advisory notes, and when  
5 they talk about somebody that has a compelling circumstance,  
6 such as an accident or illness that affects his or her  
7 ability to be at trial in person. Caselaw says it's that  
8 person. It's not a relative. There are cases out there  
9 that say being a caretaker doesn't count. I don't know if  
10 there are other caretakers.

11           This is the caselaw. *Donohue v. U.S. Department of*  
12 *Homeland Security* that is cited, noting the witness's  
13 caretaking responsibilities but denying the request for  
14 remote testimony. The case of *In re Kirkland*, underscoring  
15 that, "Remote testimony is the exception, and live,  
16 in-person testimony is strongly preferred."

17           The New York case *Radosti v. Hudson's Bay Company*,  
18 which says that no caselaw permits remote witness testimony,  
19 "Based solely on caretaking responsibilities." So even if  
20 that caselaw wasn't there, this is still within the Court's  
21 discretion. The zoom requests are supposed to be made in  
22 advance, and this was the 11th hour. So tell the Court what  
23 you did to get the witness here. Did you have plane  
24 tickets?

25           MR. HAYSBERT: So, Your Honor, the way that my

1 practice is, has been with Dr. Haider, and it happened  
2 whenever we were here a year ago preparing to go to trial,  
3 and she was appearing to testify live, we were here in  
4 March. She was appearing to testify live. Neither of those  
5 situations involved anyone on my team.

6 The regular practice of the way that we conduct our  
7 business is I pay Dr. Haider up to the point of trial, and  
8 we show a zero invoice, and she handles her own flight and  
9 hotel arrangements. So that's been the way that we've  
10 always worked.

11 THE COURT: Do you have an agreement to that  
12 effect?

13 MR. HAYSBERT: Your Honor, there is nothing  
14 specific in an agreement that says that you take care of my  
15 flights, but it's always been that case. She would take  
16 care of her own flights and her own hotel arrangements,  
17 pursuant to the fact that I paid her the balance that's  
18 owed, and then I also pay her for the trial testimony as  
19 well. So we have an agreement that here is how much my  
20 trial testimony is going to cost, and that would include  
21 flights and everything else. I pay her that specific  
22 amount, and that specific amount has been paid. Now it's up  
23 to her to make, through her office, her own flight  
24 arrangements and hotel arrangements, and that's never been  
25 changed.

1           So I made sure that my firm had paid her everything  
2 that she was owed and also everything that she would need to  
3 testify at trial. There is a specific amount, and that  
4 amount has been paid, and it was paid even before the last  
5 trial date. So, you know, they confirmed with me, you paid  
6 for the trial. I've paid for the trial already. It is a  
7 matter of her getting on the plane and getting here using  
8 her own office. She has her own office and assistant and  
9 staff to do the flight arrangements and the hotel  
10 arrangements as she sees fit. My job is only to pay her,  
11 and I've done that. I'm happy to provide confirmation to  
12 Your Honor regarding that. No problem at all.

13           The issue here is that it is up to your discretion,  
14 and I do want to make it clear, Your Honor, that this was an  
15 ambush for me as well. I didn't know, and sometimes these  
16 things happen. At the same time that Mr. McGavin's expert  
17 was having back surgery and brought it to my attention a  
18 week before trial, and he wanted to do a *de bene esse*  
19 deposition three days or four days before trial. The same  
20 time that was going on, Dr. Haysbert's brother was entering  
21 into his end of life, and that was an issue that happened  
22 suddenly and overnight.

23           So I'm aware that human beings are human beings. I  
24 don't know what goes on in the lives of human beings. I  
25 just try and deal with whatever I can. In this particular

1 case she informed me that she could not make the trial in  
2 person, not that she couldn't do it at all, but that she  
3 couldn't make it in person because she is responsible for  
4 her father's end-of-life care, and apparently she believes  
5 he is dying because his oxygen levels are decreasing. I  
6 know I've been through that situation myself. I didn't ask  
7 a bunch of questions about, you know, which hospital and  
8 where is he. I assume that she would be telling me the  
9 truth.

10 Now, I can go back to her and find out whether or  
11 not he is in Houston with her, or if she is even in Houston.  
12 I think she is. She's put that in her affidavit that she  
13 was in Houston, Texas. I'm assuming that he is there in  
14 Houston with her. I'm assuming that, you know, she may be  
15 his only relative. She's responsible for his end-of-life  
16 care. I don't know what, you know, to do about that other  
17 than to bring that to the Court's attention, and let you  
18 deal with the matter at hand.

19 But, Your Honor, this is not a situation, as I  
20 said, where I knew going into that final status conference  
21 she would not be here. It didn't come up until afterwards  
22 on the 2nd when she told me her father was out of the  
23 hospital -- or had been released or discharged from the  
24 hospital on August 2nd and was now recuperating, and his  
25 oxygen levels were lower.

1 I'm happy to go back to her and say, "Can you  
2 please provide me with medical evidence of all of this, his  
3 location, and is there anyone else that can care for him?"  
4 I'm happy to do that, Your Honor, and redo the affidavit, if  
5 you prefer. I can get back to her immediately and find out,  
6 you know, what we can do about this.

7 THE COURT: Let me respond to a couple of things  
8 that you've said. Again, as we've talked at the August 1  
9 conference, we are not going back over things. Every  
10 continuance that occurred was for a good reason, and you  
11 agreed to that continuance in March, and, in any event, a *de*  
12 *bene esse* deposition is the way you take care of something  
13 like that, if a witness can't be available. That is a way  
14 that is allowed under the rules.

15 But it never came to the Court's attention other  
16 than through the motions and the agreement. In other words,  
17 we are not going back over all of that. That's the first  
18 thing. We are here today, this trial has been set since  
19 March, and so I haven't seen a copy of whatever agreement  
20 you had with Dr. Haider. You claim that you had an  
21 agreement where she's going to pay to get to trial. I've  
22 not been aware of such an agreement, and what correspondence  
23 did you have with her? You have certainly been able to  
24 e-mail constantly to the Court, and what do you have to back  
25 up what you're saying? I'm just saying that you claim there

1 is an agreement. They said something else, and I'm going to  
2 hear from Mr. McGavin, something about an appearance for  
3 trial. So somebody's seen an agreement somewhere.

4 So I have questions about, you say it's an  
5 agreement, and she's fully paid. She hasn't said that she  
6 had an agreement, and she's been fully paid, and that she  
7 was to make the trial arrangements, and she didn't. I mean,  
8 all of this is just representations to the Court. There  
9 needs to be an affidavit. I can't imagine you don't have an  
10 agreement with an expert, because people just don't take  
11 experts without agreements. You have to have an hourly  
12 rate. You have to have appearance rates.

13 So there's been no agreement presented to the Court  
14 that said she was responsible for getting herself here, and  
15 if she was, then I think that in the future you ought to be  
16 careful about such agreements because you're leaving it up  
17 to somebody else to be responsible for their appearance in  
18 court, but you ultimately are responsible as counsel.

19 Did you say, "Have you made your plane  
20 reservations? When are you coming in?" if you're planning  
21 your witnesses. There is nothing before the Court other  
22 than her saying, "My father is in the hospital, I'm his  
23 caretaker, and his oxygen levels are going down." I'm not  
24 saying that any of that isn't correct, but under the  
25 caselaw, frankly, in my mind is not a grounds to exercise my



1 discretion to say, all right, at the 11th hour, you can't  
2 get here and be here in person. You've been retained as an  
3 expert, and you've got to fulfill your expert duties.

4 An expert is very important. This is one of your  
5 liability experts. Do you have another liability expert?

6 MR. HAYSBERT: This is not one of the liability  
7 experts, Your Honor. She is the damages expert. She's the  
8 neurologist. And also, she never indicated in her sworn  
9 testimony that she is a caretaker. She just said that she  
10 is responsible for his end-of-life care.

11 THE COURT: That is a caretaker.

12 MR. HAYSBERT: I make a distinction because I  
13 wasn't my uncle's caretaker, but I watched him literally  
14 take his last breath in front of me. I was responsible for  
15 his end-of-life care. The doctors talked to me when it came  
16 to all of those things at the end, but I certainly wasn't  
17 his caretaker. I would make that distinction and  
18 distinguish that. There are a line of cases talking about  
19 caretakers. She never indicated she was his caretaker.  
20 This is strictly the fact that his oxygen levels are  
21 dropping, and he's probably going -- you know, about to  
22 transition. That, I think, is where the distinction is.  
23 There is also sworn testimony.

24 I can only accept it for what she said, that this  
25 is what's happening to him under penalty of perjury, and I'm

1 responsible for his end-of-life care under penalty of  
2 perjury. And, Your Honor, I have another damages expert who  
3 is coming live.

4 THE COURT: Wait just a minute, please. I want to  
5 find her affidavit. Where is it in your filing, your  
6 plaintiff's motion for leave? I know I saw it.

7 MR. HAYSBERT: The declaration is attached as  
8 Exhibit A.

9 THE COURT: Exhibit A. She says that she is  
10 responsible for her father's end-of-life care. So I don't  
11 know how that is not a caretaker.

12 MR. HAYSBERT: Again, I'm making the distinction  
13 based on my own experience. End-of-life care, meaning a  
14 person is about to transition. They're not necessarily a  
15 caretaker. A caretaker can be someone who is stable, whose  
16 oxygen levels are not dropping. May be seriously ill but is  
17 not in danger of dying in the next one or two days. That's  
18 what I would distinguish it as.

19 THE COURT: I don't think we should mince  
20 definitions, caretaker, because, in any event, she doesn't  
21 say that there is no one else responsible. Does he have a  
22 spouse? Does he have a partner? Does he have other  
23 children? Does he have siblings? There are a lot of people  
24 who can be responsible for your end-of-life care.

25 MR. HAYSBERT: If I may respond to that, Your

1 Honor.

2 THE COURT: Let's move on. We are not going to  
3 mince words over when she says end-of-life care. She hasn't  
4 given an adequate reason in this particular declaration for  
5 the rules and under the law, that I would exercise my  
6 discretion without more. There is just nothing here to tell  
7 the Court how old this person is, whether he's there. If  
8 you're responsible, is she there? Is there a spouse? Is  
9 there a partner? All those things. Not that there is no  
10 one else available. So she is responsible. There may be  
11 five people responsible.

12 There are no medical records here to show the state  
13 of the individual. On top of that, there is nothing before  
14 the Court to show that she was really planning to come. Did  
15 you all correspond by e-mail? You were a week before trial  
16 on August 1. You had to have been lining up your witnesses.  
17 At the end you all were asking about that, and I believe I  
18 told you, you all talk about your witnesses and your  
19 scheduling.

20 So I don't know what went on with your  
21 conversations, but we had done the final pretrial, and she  
22 was listed, and she was listed as a person who was going to  
23 appear as a witness. Is there anything else you want to say  
24 new about these matters? Do you have your agreement?

25 MR. HAYSBERT: Your Honor, I could bring up the

1 agreement between us. I'm relatively sure it doesn't say  
2 anything about travel arrangements in the agreement itself,  
3 but I will double-check it.

4 THE COURT: Let me hear from Mr. McGavin, and then  
5 I'll give you a chance to respond, Mr. Haysbert.

6 MR. HAYSBERT: Thank you.

7 MR. MCGAVIN: Your Honor, John McGavin on behalf of  
8 Outback and Bloomin' Brands. I do have a copy of the  
9 National Brain Injury Institute deposition and trial fees  
10 and payment terms effective September 25, 2020, that we  
11 referenced in our papers, and I can provide that to the  
12 Court. We don't have an updated fee schedule, but what it  
13 says is, "Trial testimony is an eight-hour minimum of  
14 \$8,000. In regard to travel time, that's \$350 an hour,  
15 billed in advance; preparation time, \$500 an hour minimum;  
16 travel charges at cost, billed in advance; invoice for  
17 balance sent immediately upon completion of services;  
18 payment due within 10 business days of receipt of invoice.  
19 Cancellation policy: 14 days' notice, deposit retainer will  
20 be fully refunded. Less than 14 days' notice, deposit  
21 retainer is non-refundable. All non-refundable travel  
22 expenses are due regardless of notice amount." I can  
23 provide a copy of this to Your Honor if that would be  
24 helpful for the record.

25 THE COURT: Yes, it would be. I'll mark that as

1 Defense Exhibit Number 1.

2 MR. MCGAVIN: Thank you, Your Honor.

3 (Defendant's Exhibit 1 received in evidence.)

4 MR. MCGAVIN: It contains my highlighting as I was  
5 preparing for trial.

6 THE COURT: That's fine. This was produced during  
7 discovery?

8 MR. MCGAVIN: Yes, Your Honor. It was part of the  
9 Rule 26 disclosure.

10 THE COURT: All right. Did you get any CV at all?

11 MR. MCGAVIN: We did, Your Honor. I have that, as  
12 well, in the Rule 26 disclosure.

13 THE COURT: I would like to see that because when I  
14 researched the doctor on the computer, or ran her name, it  
15 says she is an anesthesiologist. Now, I know that she's  
16 part of the brain center, but it does say, I think, that  
17 she's an anesthesiologist. Her CV may say more, but I don't  
18 count on the Internet bios because who knows who puts them  
19 up, but I think it was the bio that was with her group, was  
20 what my law clerk ran up, was her biography with her group,  
21 but I would prefer to see her CV.

22 MR. MCGAVIN: Your Honor, I do have the CV that was  
23 provided in the Rule 26 disclosure, and she is board  
24 certified in anesthesiology. She has obtained some  
25 certifications from the -- she is board certified in

1 neurocritical care through the United Council of Neurologic  
2 Subspecialties. But she is not residency, fellowship  
3 trained in neurology. So I can present that to Your Honor.

4 THE COURT: That will be Defense Exhibit Number 2.  
5 (Defendant's Exhibit 2 received in evidence.)

6 MR. MCGAVIN: Certainly, Your Honor, that is and  
7 was going to be a matter the defense intended to explore  
8 with Dr. Haider.

9 THE COURT: You can go ahead and continue.

10 MR. MCGAVIN: Thank you, Your Honor. We rely upon  
11 what we've submitted in our papers. The missing pieces here  
12 are, as I mentioned in our papers, where is the hotel  
13 reservations? Where is the plane ticket or confirmation?  
14 Even if Dr. Haider is doing that reservation, did she ever  
15 purchase plane tickets? Those would be non-refundable under  
16 the agreement. And did she actually have any time that she  
17 had reserved in her calendar? She gives us one time for  
18 the -- under her declaration, 4:00 p.m., and she doesn't say  
19 what she is doing the rest of the day. I speculate, and  
20 purely speculation, but knowing doctors as they are, when  
21 they say it's a 4:00 deposition, they might be seeing  
22 patients during the day.

23 So arranging a doctor, particularly an out-of-state  
24 doctor, there has to be significant logistical details  
25 worked out. You need the expert to come in the day before

1 because of flight challenges. You need to have a meeting  
2 the day before, and then you put the witness on, depending  
3 upon the Court's calendar, and when the Court will be  
4 entertaining evidence the following day, then the expert  
5 would fly back out. We have none of that.

6 What we have is, when we went to see Judge Miller,  
7 we learned for the first time that there was going to be an  
8 issue with Dr. Haider for the settlement conference, but if  
9 Mr. Haysbert knew this on the 2nd, that certainly was not  
10 brought to our attention. And there is a pattern here. I  
11 also have a subpoena which was issued to Nick Seifert and  
12 served yesterday morning for trial on Wednesday, the 9th, no  
13 fee for him.

14 THE COURT: We are going to get to that. You are  
15 jumping ahead of yourself. You can say that's part of the  
16 11th hour pattern, is what you are arguing.

17 MR. MCGAVIN: Yes, it is.

18 THE COURT: I haven't ruled on that. That's the  
19 other matter that we are going to take up today.

20 MR. MCGAVIN: I'm sorry, Your Honor. That's part  
21 of this 11th hour, the way this case is being put together.  
22 All new jury instructions are coming in. Finding  
23 instructions. It's as if this was not prepared and ready to  
24 go. My experts have been lined up for months. Pretrial  
25 meetings have occurred. Payments have been made. You just

1 don't have a case where you don't have correspondence,  
2 invoices, canceled checks, arrangements are made,  
3 particularly when you run the risk of an out-of-state expert  
4 coming from California -- he's got two California experts;  
5 one in Houston and one in Florida. There are plenty of  
6 great doctors right here in Virginia; MCV, you name it.  
7 There are plenty of great medical schools and physicians  
8 here.

9           So for all of these reasons, Your Honor, number  
10 one, the subpoena is invalid and signed -- we noted signed  
11 by Mr. Haysbert, not by local counsel. It's not properly  
12 served. We don't have any reference on that. An effort to  
13 subpoena her, in and of itself, is improper because the  
14 attorney is actually representing that it's valid by trying  
15 to serve it or present it.

16           Then there is no good cause that has not been  
17 explained why we waited until the last minute and have no  
18 evidence other than this declaration. There are no  
19 compelling circumstances, as the Court has pointed out. So  
20 we respectfully submit that the motion for remote testimony  
21 should be denied. Thank you.

22           THE COURT: Let me check one thing, Mr. McGavin.  
23 Actually, Exhibit A appears to be the subpoena, at least in  
24 the package that I printed off. Exhibit A is Page 3 of 6,  
25 and the next page is Page 4 of 6. So that's the subpoena.



1 First of all, this subpoena wasn't issued until August 4,  
2 2023.

3 MR. MCGAVIN: That's correct, Your Honor.

4 THE COURT: How in the world are you going to get a  
5 subpoena down to -- well, again, it wouldn't matter because  
6 if there had been a motion -- you don't subpoena somebody --  
7 there are other ways you do it. If you want testimony from  
8 somebody outside of the hundred miles, and they can't be  
9 here, first of all, they are your expert. Second of all,  
10 you would move for a *de bene esse* deposition, and whatever  
11 the cause would be at that time would depend upon whether or  
12 not you would get the *de bene esse*. This is a subpoena that  
13 went out from Mr. Haysbert on August 4, and it doesn't bear  
14 the signature of the clerk or deputy clerk.

15 Did the clerk issue the subpoena? Why doesn't it  
16 bear the signature?

17 MR. HAYSBERT: Bears my signature, Your Honor.

18 THE COURT: It's typed with an S. So you just did  
19 this up.

20 MR. HAYSBERT: I can explain it to the Court, Your  
21 Honor.

22 THE COURT: Wait just a minute. Let me finish  
23 looking at it.

24 Mr. McGavin, is there anything else?

25 MR. MCGAVIN: No. Thank you, Your Honor.

1 THE COURT: You can come back and respond,  
2 Mr. Haysbert.

3 MR. HAYSBERT: Your Honor, the subpoena was --  
4 because I never subpoenaed an expert of mine before, it was  
5 simply to encourage Dr. Haider to come. It was something  
6 that I explored with her. If I send you a subpoena, will  
7 you come? Now, she is not an attorney. I don't know if she  
8 is aware of the fact that the subpoena power of the court  
9 doesn't extend beyond a hundred miles. But I did that in an  
10 attempt to get her here. That was all that was.

11 THE COURT: Excuse me for a minute. Did you just  
12 mail it, e-mail it? How did you send it to her?

13 MR. HAYSBERT: I e-mailed it to her.

14 THE COURT: You didn't have a process server?

15 MR. HAYSBERT: Did not have a process server.

16 THE COURT: It hasn't even been served?

17 MR. HAYSBERT: No, Your Honor, it has not been  
18 served, not through a process server, but it was sent to  
19 her, you know, asking her please come. "The judge really  
20 needs you here," you know.

21 THE COURT: Not the judge that needs you here.  
22 Your client needs her here.

23 MR. HAYSBERT: That's certainly correct, Your  
24 Honor. My client does need her here, but given the  
25 circumstances, you know, that was the next best thing I

1 could think of. Unfortunately, her response was, "I'm happy  
2 to sign this one affidavit to tell the Judge" because it was  
3 going to you as a motion, "Why I cannot be there in person."  
4 That's what she provided me. But I think the facts speak  
5 for themselves.

6 THE COURT: The facts do speak for themselves, and  
7 the facts don't speak favorably to allowing remote  
8 testimony. That's the problem.

9 MR. HAYSBERT: Well, I wanted to handle the point  
10 that was being made about all this 11th hour business. This  
11 is the first time there has been an 11th hour situation with  
12 me and my firm. With respect to my experts, they are all  
13 coming with the exception of Dr. Haider, you know, depending  
14 on what the Court's scheduling is and how we get through.  
15 Everybody else is coming. Everybody else is here. I don't  
16 have logistical problems with local counsel, with trial  
17 tech, with attorneys that work with me, with the plaintiff,  
18 with the plaintiff's daughter, with other witnesses. We  
19 don't have any of these issues.

20 The problem is only with Dr. Haider, and the issue  
21 wasn't an issue until the day after the final status  
22 conference when she informed me that her father had been  
23 discharged from the hospital. That's when I was told that,  
24 and unfortunately, my hands are tied. What could I do but  
25 try and attempt to get her here? I did speak about it with

1 the Magistrate Judge because it had come up, and it was  
2 something that came up suddenly. It was something that was  
3 not in my control.

4 So I'm happy to do whatever the Court wants to do,  
5 but, unfortunately, she's provided a sworn declaration  
6 saying my father is at end of life, and I'm his end-of-life  
7 care person. That's what I do, at the end of his life. So  
8 I can't argue with that. The person -- her family member is  
9 dying, her father. This is not some associate. This is her  
10 father we are talking about.

11 THE COURT: When did you e-mail the subpoena? This  
12 says August 4. What time?

13 MR. HAYSBERT: That must have been the day I  
14 e-mailed it, Your Honor.

15 THE COURT: Was it after your conference with Judge  
16 Miller?

17 MR. HAYSBERT: It was after the conference with  
18 Judge Miller.

19 THE COURT: And that was because Judge Miller  
20 mentioned Rule 43 to you?

21 MR. HAYSBERT: It wasn't because he mentioned Rule  
22 43 to me, but he did express concern that she would not be  
23 able to come unless you, you know.

24 THE COURT: So he didn't mention Rule 43?

25 MR. HAYSBERT: He did mention Rule 43. He did.

1 THE COURT: So you have a conference. You found  
2 out on the day after, you found out on the 2nd that she  
3 couldn't be here.

4 MR. HAYSBERT: Her father was discharged on the  
5 2nd.

6 THE COURT: I thought you said you found out on the  
7 2nd?

8 MR. HAYSBERT: Her father was discharged on the  
9 2nd. I spoke to her, I believe it was the 2nd. It was  
10 before I spoke with Magistrate Judge. So the conference on  
11 the 3rd, so it would have been the 2nd, Your Honor.

12 THE COURT: The conference was on the 4th.

13 MR. HAYSBERT: Then it may have been on the 3rd.

14 THE COURT: The conference was on the 4th.

15 MR. HAYSBERT: Okay. Then my conversation with her  
16 may have been on the 3rd, then, is what I'm suggesting. I'd  
17 have to go back and check. I don't have anything in front  
18 of me to be able to verify for the Judge when that  
19 conversation happened because that would be on my cell  
20 phone.

21 THE COURT: So you didn't e-mail her about her  
22 appearance, she just called you and said, "This is the  
23 situation," and then on the 4th you mentioned it to Judge  
24 Miller, he raises Federal Rule of Civil Procedure 43, and  
25 then later that day you send out the subpoena?

1 MR. HAYSBERT: Yes, Your Honor, I believe that's  
2 the case.

3 THE COURT: Then at 10:01 on Sunday night you filed  
4 this motion?

5 MR. HAYSBERT: That is correct, Your Honor.

6 THE COURT: Well, I'm going to take a brief recess,  
7 and I would like for you to present to the Court your  
8 agreement with the expert that says she was responsible for  
9 being here and paying her own costs and doing all of that.  
10 If that's an agreement, I want to see that, and then we will  
11 go from there. You say that you had met all the payments in  
12 the agreement. There is a lot of verification that can be  
13 provided to a Court that isn't here right now; the  
14 information about her father and the information about what  
15 arrangements you have actually made to get the witness here.  
16 This trial was set in March, and you don't wait until a  
17 week, less than a week before trial to start worrying about  
18 whether your witnesses are going to be here. It's just not  
19 timely. You have to take responsibility for it if that is  
20 what happened.

21 So that's the kind of agreement. Whatever you have  
22 as an agreement in writing with her, and whatever e-mail  
23 correspondence you have with her about her appearance here,  
24 I want that produced, and I'm going to take a 15-minute  
25 recess, and I want you to produce it. You've got a tech

1 person here. You've got it on your computer, so produce it.

2 MR. HAYSBERT: Your Honor, if I may, I believe the  
3 contract that we had is Exhibit A that defense attorney  
4 provided you. I don't think there is anything different,  
5 but we will check.

6 THE COURT: That's it?

7 MR. HAYSBERT: That's the fee agreement. If I'm  
8 not mistaken, that is the fee agreement, and that fee  
9 agreement did not provide for me to provide her airfare and  
10 a hotel.

11 THE COURT: I thought you said just the reverse,  
12 that the agreement provided that said that she had to do  
13 that.

14 MR. HAYSBERT: No.

15 THE COURT: You said that earlier.

16 MR. HAYSBERT: No, Your Honor. What I said was I  
17 have to pay her a stated amount that covers everything,  
18 including whatever airfare and hotel arrangements she  
19 decides to make.

20 THE COURT: Tell me where that is in this  
21 agreement.

22 MR. HAYSBERT: It's implied in the agreement.  
23 Everything -- it says it in the agreement that I pay her an  
24 amount for trial, and then I'm responsible for the cost of  
25 her airfare and all the other things. It doesn't say in

1 that agreement that I am to make her hotel arrangements and  
2 her flight arrangements.

3 THE COURT: Mr. McKelvey, you are local counsel.  
4 I'm going to hold you responsible for some of this because  
5 there are no signatures on this agreement. Your signature  
6 is not on it, Mr. McKelvey's signature isn't on it, and her  
7 signature isn't on it. This is just deposition and trial  
8 fees and payment terms. It says that her services, her  
9 deposition and trial services, that she was the subject  
10 matter expert. She would review medical records and  
11 literature. She would prepare and self-study, and she would  
12 give time for deposition and trial. The deposition was a  
13 thousand an hour, six hour minimum. It goes and talks about  
14 the deposition terms. Then the trial, a thousand an hour,  
15 eight-hour minimum charge, 8,000. 8,000 deposition retainer  
16 due in order to reserve date. Did you pay that?

17 MR. HAYSBERT: Yes, we paid -- that's what I was  
18 referring to earlier. The \$8,000 is the amount that I paid  
19 to make sure that she -- there were no issues of her being  
20 here to trial.

21 THE COURT: It just said in order to reserve date.  
22 That's all it says here.

23 MR. HAYSBERT: That's correct.

24 THE COURT: Doesn't say in order to reserve date,  
25 and it says, if between two and eight hours, any credit will



1 be returned within 90 days. If greater than eight hours,  
2 the balance will be billed. She's got preparation time,  
3 she's got travel time, and it says billed in advance. So  
4 did you get any travel time billed in advance?

5 MR. HAYSBERT: My understanding, Your Honor, is all  
6 of that was part of it.

7 THE COURT: That's not what this says. It's an  
8 exhibit before the Court, and it was produced by you during  
9 discovery. You can have understandings with people, but  
10 when you're dealing with contract services, you need to have  
11 it in writing. This doesn't say that. It says, "Travel  
12 charges at cost, billed in advance." So did she bill you  
13 any travel? Did you ask her, "Why haven't I had any travel  
14 charges at cost billed in advance? What about your plane?"  
15 Travel time is different. Travel time is set out here at  
16 350 an hour billed in advance, and it tells you what it's  
17 going to be, and if there's leftover money, if the  
18 trial testimony is not greater than eight hours, you get a  
19 return, and if it's greater than eight hours, the balance  
20 will be billed. There is a distinction here in billed and  
21 billed in advance. Then it goes on to say, "Travel time,  
22 350 per hour billed in advance." So somebody is charging  
23 350 an hour to travel, and that's not unusual for experts.  
24 "Travel charges at cost, billed in advance." So you have to  
25 have something in your file. When did you contact her to

1 testify in this case? What's going on, Mr. Haysbert?

2 MR. HAYSBERT: What I have, Your Honor, is a sworn  
3 declaration from her explaining that her father is ill, and  
4 at the end of his life, and his oxygen levels are dropping.  
5 I cannot allow the Court to dismiss the sworn declaration of  
6 a doctor who is explaining why she cannot make it to trial  
7 live. She's already indicated that she can do it via zoom.

8 The focus here is on the compelling circumstances  
9 that does not allow this expert to get here, not on whether  
10 or not I billed -- I purchased her a flight or a hotel room.  
11 I purchased hotel rooms for people that work for me that are  
12 here for trial. I haven't purchased hers. But I have a  
13 room or rooms of hotel rooms for people that are coming in  
14 for trial. But the issue here is about the compelling  
15 circumstances as to why she can't make it here live, and the  
16 compelling circumstances, Your Honor, is her father is ill,  
17 and she would prefer to be by his bedside or in the hospital  
18 than being here live in case anything happens to him, and I  
19 understand that.

20 I focused the declaration on exactly what the  
21 circumstances require, and that is compelling evidence that  
22 they cannot appear live. And it appears to me that the  
23 Court is asking me questions about all these other things  
24 I'm not prepared to respond to that I have to go back and  
25 research that have to do with e-mails and flights and hotels

1 when the issue here is compelling circumstances, and the  
2 compelling circumstances is her father is near death, and  
3 because her father is near death, she has to be there with  
4 him, which I completely understand. I think any human being  
5 would understand it. I understand that. I understood it  
6 when you caught COVID the day before trial. I understood it  
7 when his witness had a back injury and had to get surgery on  
8 the day of trial, essentially, and I understand it with  
9 Dr. Haider when she says my father is ill, and I cannot make  
10 it to court in person. I've got to appear via zoom.

11 Now, I can get back to her and say, "The Judge will  
12 not allow you to do it, you've got to get on a plane,"  
13 because if she doesn't get on a plane, then that is going to  
14 affect the plaintiff's case. So I'm between a rock and a  
15 hard place. On one hand I've got a doctor who is saying I  
16 can't be here because my father is ill. On the other hand I  
17 have Your Honor, the Judge, who gets to make the decision  
18 whether or not this case is going to go forward with an  
19 important expert, a damages expert, who is supposed to come  
20 here and talk about, you know, what issue she's having in  
21 her brain and the damages she is going to suffer for the  
22 rest of her life as a result of the fall.

23 She is our causation expert. She is one of them on  
24 whether or not the fall was the cause of her injuries. So  
25 if the person can't make it, and she's given me this reason,

1 I can go back and try to, what do you mean? Where is your  
2 father? and all this. She is providing sworn testimony. I  
3 just don't understand what's happening here.

4 THE COURT: Let me interject something. What's  
5 happening here is you are the one between a rock and a hard  
6 place. I am totally sympathetic to Dr. Haider's situation,  
7 but the rules and the law, all I'm doing is applying the  
8 rules and the law, and, frankly, defendants would have a  
9 good appeal point on an abuse of discretion as not permitted  
10 under the rules and the law and at the 11th hour.

11 I have not been able to find a case in your favor.  
12 The rule is very specific, says exceptional circumstances.  
13 The courts who have considered it say this is not  
14 exceptional circumstances. You are the one between a rock  
15 and a hard place. You are saying you have shown the Court  
16 nothing that you expected her to be here. Nothing. You  
17 have not shown the Court anything where you have expected  
18 her to be here and that you've acted timely.

19 You haven't presented the Court, and I'm going to  
20 ask Mr. McKelvey as local counsel what contact has been  
21 made. He is local counsel. He is responsible. He is  
22 responsible to the Court. He took on being local counsel,  
23 and our rules are very clear. You are an officer of the  
24 Court at this point *pro hac vice*, as is Mr. McKelvey. So I  
25 want to know. You keep trying to put this on any human

1 being would be sympathetic and understanding. Well, I am  
2 sympathetic and understanding. I've certainly had  
3 end-of-life situations in my family with my parents, with a  
4 husband. So I've had end of life circumstances, and I think  
5 it's very important, and I'm certainly sympathetic. But I  
6 have to follow the law and the rules. All you keep saying  
7 is any human being would understand.

8 Well, I do understand. But the point being is,  
9 what have you done as an attorney? You are between a rock  
10 and a hard place, and you put your client between a rock and  
11 a hard place. But you haven't done anything but stand up  
12 there and repeat and repeat and repeat a page and a half  
13 affidavit to the Court. You have not cited any law. You  
14 have not produced anything other than this one page that is  
15 somewhat contrary to what you represented to the Court.

16 It says here that when somebody hadn't contacted  
17 you a week before trial, when it says that, do you have  
18 anything in writing that says you paid your own expenses?  
19 This is my agreement. That's not what this says. This says  
20 travel charges at cost billed in advance. What is there in  
21 your file to show the efforts or the basis that you were  
22 expecting her here? This agreement is contrary to she was  
23 going to make her own arrangements and pay for them. And if  
24 she was, did you follow up on it? You can't just wait until  
25 a few days before trial and say, when are you coming?

1 You've got to prepare somebody. So where in your records do  
2 you have that your correspondence -- you have to have been  
3 corresponding with an expert -- that she had made her  
4 arrangements and you were expecting her for trial? What is  
5 your basis for that?

6 MR. HAYSBERT: Your Honor, we were expecting her  
7 for trial. We have paid her everything that she needs for  
8 trial. We have done that. That's what our basis was. You  
9 have an agreement that says -- there is certain amount that  
10 has to be paid for the expert for them to be prepared for  
11 trial, and we made that payment. What happened in this case  
12 is, to me, very simple. Her father is ill, and whether he's  
13 at the hospital where she is, or has a caretaker that is in  
14 addition to her, those things I'm happy to address for the  
15 Court, update the affidavit if need be.

16 But we cannot get away from the compelling  
17 circumstances, which is what the rules are. Rule 43 and 45  
18 don't talk about anything but the compelling circumstances  
19 to why that expert can no longer come to trial, and the fact  
20 of the matter is she's not able to be here because under her  
21 sworn testimony her father is ill, and that is the basis for  
22 the compelling circumstances.

23 There is nothing else that can be the basis for the  
24 compelling circumstances but that. That's it. She cannot  
25 be here live, she said, under her sworn testimony, because

1 my father is ill, and I need to be near him so in case he  
2 had to go to the hospital again, which is imminent.

3 THE COURT: She doesn't say that. She doesn't  
4 say --

5 MR. HAYSBERT: She said his oxygen levels are  
6 dropping. I understood that because I have been in a  
7 situation where a family member's oxygen levels dropped  
8 until they were dead. I'm sure anyone who has had a family  
9 member they had to take care of, who was in front of them  
10 and died in front of them, has had the same experience that  
11 I have had. So I understood it. His oxygen levels are  
12 dropping. He just came out of the hospital. He had  
13 pneumonia and respiratory failure. This is a man who is  
14 likely not going to live. So you need to be there with him,  
15 next to him, in the hospital if he goes back in there, close  
16 to him. If you get a phone call, and you're here testifying  
17 live, that your father died, and we had an opportunity to  
18 make sure that didn't happen by just allowing her to come in  
19 via zoom, that is something I don't want on my heart.

20 THE COURT: Anything else?

21 MR. HAYSBERT: That's all, Your Honor.

22 THE COURT: Mr. McKelvey, please come up to the  
23 podium.

24 MR. MCKELVEY: Yes, Your Honor.

25 THE COURT: I would assume as local counsel that

1 you have been copied on e-mails and correspondence and are  
2 aware of the arrangements made for experts?

3 MR. McKELVEY: I have not been copied on any  
4 e-mails with regard to experts other than like the  
5 disclosures, and things of that nature. The specifics of  
6 reserving them for trial, I've not been involved in.

7 THE COURT: So you haven't been involved in  
8 arranging for the experts?

9 MR. McKELVEY: To appear here logistically, no,  
10 ma'am, I have not. I don't know anything beyond what  
11 Mr. Haysbert has said, one way or the other.

12 THE COURT: What did Mr. Haysbert indicate to you  
13 about the appearance of Dr. Haider before this motion was  
14 filed, and when was it indicated to you?

15 MR. McKELVEY: The only thing indicated to me was  
16 that the motion needed to be filed and the contents of the  
17 motion, Your Honor, and then we discussed it, and I told  
18 him, you know, that I thought we were going to try to do it,  
19 we should file a formal motion requesting the Court that  
20 that was where that want, and I wasn't part of the  
21 settlement conference because I had court already scheduled  
22 during that time, so the conversations with Judge Miller I  
23 wasn't privy to.

24 THE COURT: Well, your signature is on the motion.  
25 Did you authorize your signature to go on that motion?



1 MR. McKELVEY: Yes, ma'am, I authorized my  
2 signature to go on the motion and request the Court to allow  
3 the doctor to appear remotely, based on when the information  
4 came to my knowledge and the contents of the motion and the  
5 affidavit, to the best of my knowledge, when they were  
6 filed, and, I mean, even now are accurate. I don't have any  
7 independent knowledge.

8 I only know what I've been told, and I understand  
9 it is a late motion. I do understand the timing of it, but  
10 as far as bringing it before the Court, you know, the  
11 position would be to raise it at least in advance as opposed  
12 to during trial and trying to bring it up at that point.

13 THE COURT: Obviously, it would be too late. When  
14 you sign a pleading, you certify that it's correct.

15 MR. McKELVEY: Yes, ma'am, and it is to the best of  
16 my knowledge. I can't -- like I say, I mean, I can't be --  
17 to my knowledge it's correct based on the representations  
18 that I have spoken with Mr. Haysbert, yes, but, I mean, I  
19 don't have independent knowledge of every fact a witness  
20 puts on an affidavit. I had to believe that the affidavit  
21 was true when I filed it.

22 THE COURT: Well, you didn't sign the affidavit,  
23 she did.

24 MR. McKELVEY: Right. And the contents of the  
25 motion, to my knowledge, are true, Judge. I wouldn't file

1 something that I didn't think was true. If there is  
2 something the Court is concerned about specifically, I'm  
3 happy to address it, but, I mean, in my mind it's a  
4 procedural motion for a last-minute situation that is  
5 unfortunate, and in all respects, it sounds like, and then  
6 the Court is just going to have to make a ruling on what is  
7 in front of it, as far as, you know, what's in the affidavit  
8 is what we have and what the rule is what it is, you know.  
9 I mean, the Court is going to have to make a ruling on that.

10 THE COURT: Well, you're local counsel. Where are  
11 the e-mails and the correspondence? You are going to have  
12 to see that Mr. Haysbert gets those and produces them. I'm  
13 going to take a recess. There has to have been some  
14 correspondence with this witness over appearing. This was  
15 set in March, and it's August. There has to be some  
16 communication with the witness over a period.

17 MR. McKELVEY: Your Honor, I have no knowledge one  
18 way or the other but I will -- I'm sorry.

19 THE COURT: Excuse me.

20 MR. McKELVEY: I'm sorry.

21 THE COURT: You are responsible for having  
22 knowledge, and you are responsible for the case as local  
23 counsel. I'm telling you, you get with Mr. Haysbert and  
24 talk to him and find out exactly what occurred between March  
25 and whenever this was, August 2nd or 3rd, in terms of

1 arrangements to have this witness here.

2 MR. McKELVEY: Understood.

3 THE COURT: Because there is nothing before the  
4 Court that shows that there were any arrangements to get  
5 this witness here. Nothing. So if there were no  
6 arrangements, then it would indicate that she wasn't  
7 planning to be here in person.

8 MR. McKELVEY: I have no knowledge of that, Your  
9 Honor, that she wasn't planning to be here.

10 THE COURT: That's not what I'm asking, that you  
11 have knowledge. I'm just saying there has to be something  
12 going back and forth. You don't go from March until August  
13 and not correspond with your witnesses and tell them the  
14 date of the trial and when they have to be there. You just  
15 don't do it.

16 MR. McKELVEY: Understood.

17 THE COURT: You just don't. The Court has nothing  
18 before it now except the affidavit. I'll go through what  
19 needs to be updated. But I first have to be assured that  
20 the witness actually expected to be here.

21 MR. McKELVEY: Understood.

22 THE COURT: There is nothing before the Court that  
23 says I know this has come up, but did she expect to be here?  
24 It was very unusual when somebody says to a Court, and, oh,  
25 I can be here at 4:00 by zoom, which would be tomorrow, and

1 you are going to start a witness in front of a jury at 4:00?  
2 What do you do? You've got direct examination. I've read  
3 the report. You can't put the report in. You have to ask  
4 her questions, then you have cross-examination, and you have  
5 redirect. This could go until 10:00 at night. I don't  
6 know. Somebody comes back and says, well, I can be here at  
7 4:00. The witnesses don't set the schedule.

8 The Court, in conjunction with knowing how long a  
9 witness is going to take, we set that schedule once we get  
10 going. This just isn't supportive, except by an affidavit  
11 of somebody saying my father is very ill, and I'll call it  
12 caretaker, I'm responsible for end-of--life care, then you  
13 are caretaker for end of life, I would say.

14 But, in any event, I don't know, there must be  
15 correspondence. There has to be something there in the  
16 records that show. Because that has been admitted does not  
17 support what has been represented to the Court about the  
18 travel. It simply doesn't.

19 So, consequently, I'm going to take a 15 -minute  
20 recess, and I want produced to the Court, first of all, I  
21 want to know what arrangements were being made to get her  
22 here. If you have to contact her, and she may have to  
23 submit those. That may have to be something that she is  
24 going to have to end up submitting, too. But I want to know  
25 first what the attorneys did to ensure that the witness was

1 going to be here?

2 The Court will take a 15-minute recess.

3 (Recess from 12:11 p.m. to 12:29 p.m.)

4 THE COURT: Mr. McKelvey, what have you come up  
5 with?

6 MR. MCKELVEY: Your Honor, I went through  
7 Mr. Haysbert's phone with him for e-mails. There is nothing  
8 that I can find one way or the other. He has contacted the  
9 expert's office, and they are -- and is requesting that they  
10 send over communications. So that's what we've got right  
11 now.

12 THE COURT: Well, let me tell you what we'll do for  
13 now. I'll take the motion under advisement pending a  
14 supplemental affidavit from Dr. Haider, and I will go slowly  
15 and repeat it. It doesn't have to be in this order,  
16 obviously, but this is the information that is needed. The  
17 age of her father, where he resides, the hospital that he  
18 was in, with a copy of his medical records while he was  
19 hospitalized, which will be under seal, a statement whether  
20 they're not available, but is there a spouse, partner,  
21 siblings, other children, other relatives or funds for a  
22 caretaker for two days, and if not, then list whether there  
23 are any of these people and where they're located. Just  
24 don't say there is nobody. I want to know the spouse, if  
25 there is one, a partner, siblings. I want names and

1 addresses. If this is a doctor who has founded a brain  
2 institute, National Brain Injury Institute, there certainly  
3 should be funds and arrangements that can be made for a  
4 caretaker for a couple of days. So we have age, place of  
5 residence of the father, hospital where he was hospitalized,  
6 medical records under seal, and a statement, if there is a  
7 spouse, partner, siblings, other children, other relatives,  
8 and availability of funds for a caretaker, and the names and  
9 addresses of all of those individuals. You have to  
10 establish exceptional circumstances.

11 I would note that no one was even requesting  
12 anything like zoom for civil trials. You might have a *de*  
13 *bene esse* deposition until COVID. As I say, I never took  
14 any testimony except one where the person himself was unable  
15 to even move and travel. But be that as it may, you still  
16 have to show that, and that rule has not been changed before  
17 or after COVID. The rule remains the same and has been the  
18 same for years. I'm not finished with what needs to be in  
19 the affidavit. I would require Dr. Haider to state under  
20 oath when she first provided notice to Mr. Haysbert of her  
21 father's condition and the fact that she could not testify  
22 in person at trial.

23 I'm going to require Dr. Haider to state under oath  
24 what prior travel arrangements had been made for her  
25 appearance at trial, and if no arrangements were made, then

1 why not? I'm going to require Dr. Haider to state under  
2 oath whether any patient appointments were made or scheduled  
3 in advance to take place on August 8 and 9, 2023, and if so,  
4 the time frame that those appointments were made. I'm going  
5 to require Dr. Haider and Mr. Haysbert to produce a  
6 timeline, going to have her produce it under oath, and I'm  
7 going to have Mr. Haysbert produce it, if he can, from his  
8 files of all notifications provided to Dr. Haider between  
9 March, whatever date that we set. You can look at the  
10 docket. Was it March 23rd? I think that's when it was.

11 MR. HAYSBERT: I believe it was earlier.

12 THE COURT: I'm going to have the clerk look at it.  
13 May have been March 3rd. March 1st. Between March 1st and  
14 the date that Mr. Haysbert says he got the first  
15 notification. I believe he said it was either August 2nd or  
16 3rd, or you can say through August 4th, because that's the  
17 first time that it was mentioned apparently to Judge Miller  
18 in a settlement conference. Of course, the undersigned is  
19 not a part of that.

20 Do you need the Court to repeat any of that?

21 MR. HAYSBERT: Not me, Your Honor.

22 THE COURT: That affidavit needs to be here on or  
23 before 5:00 p.m. tomorrow. I'm also going to require, there  
24 are, I believe, three other experts, and I'm going to  
25 require that an affidavit be submitted by each of those

1 experts that they plan to be at trial and that arrangements  
2 have been made and what arrangements have been made.

3 We are not going to get in the middle of a jury  
4 trial and start having people not appearing. I fear that's  
5 what's going to happen. So you've got two people from  
6 California. There has to be some arrangements now. You  
7 just don't make flight arrangements at the last minute. If  
8 they are coming by another mode of transportation, they  
9 should have already left.

10 Likewise, you've got somebody coming in from  
11 Florida. So the arrangements should be made, and you should  
12 be prepared to have flight confirmations for the Court if  
13 that's the way they're coming, because then if a flight gets  
14 canceled, that can be checked.

15 Mr. McKelvey, do you need me to repeat any of those  
16 things?

17 MR. MCKELVEY: No, Your Honor. I think I have them  
18 all.

19 THE COURT: Mr. Haysbert, do you need me to repeat  
20 any of those things?

21 MR. HAYSBERT: No, Your Honor. I have them all.

22 THE COURT: All of this is due to the Court on or  
23 before 5:00 p.m. tomorrow. I would just make two comments.  
24 As I say, I take the motion under advisement pending receipt  
25 of this further information. At this point the Court does



1 not have sufficient information about the timing of these  
2 events, the severity of these events, whether there is  
3 anybody else who can take care of these matters, whether the  
4 doctor made appointments. If the doctor made appointments  
5 well in advance, then she wasn't planning to be here.

6 So there is a lot of information out there that's  
7 lacking if you're going to show exceptional circumstances.  
8 That's going to have to be produced. You just don't come in  
9 and say someone is very ill, and I'm their caretaker. I  
10 note something that I find interesting. There was a  
11 disconnect there, in the Court's mind, when Mr. Haysbert was  
12 saying why he issued the subpoena. He issued it knowing  
13 that it wasn't valid, but she wasn't a lawyer, she wouldn't  
14 know, and that could put pressure on her. Well, he had the  
15 information, he said, by August 4th, and yet he's a lawyer.  
16 Is he trying to dupe an expert? I don't know what's going  
17 on, but there was a disconnect between why did you send a  
18 subpoena to say that might put pressure on her, if she  
19 wouldn't know the rules, and yet then explaining that  
20 anybody with a heart, any sense of human kindness would  
21 understand end-of-life care.

22 I think we all understand and feel very strongly  
23 about end-of-life care, because I'm sure most of us, I agree  
24 with Mr. Haysbert, have experienced it. The other is,  
25 Mr. McKelvey, I would just say that it seems like there has

1 been a lack of communication between local counsel and the  
2 *pro hac vice* counsel, and that's the whole reason for local  
3 counsel.

4 If you look at our local rules, I can turn to you  
5 at any time and say you're going to examine the witness.  
6 I'm looking to you to take care of this. I find that very  
7 disappointing as someone who is a member of the bar of our  
8 court, that there, obviously, has not been the communication  
9 that is expected of local counsel and the responsibility  
10 that is expected of local counsel. I'm not talking about  
11 Friday. I know that you said you couldn't be there, and it  
12 was a last-minute settlement conference that was set up, so  
13 I'm not talking about that. I'm just talking about the  
14 disconnect and the other communication.

15 MR. McKELVEY: I apologize, Your Honor.

16 THE COURT: Thank you. The next thing that we are  
17 going to take up is this motion to quash the subpoena. Wait  
18 just a moment. You can argue that. Who is going to argue  
19 the motion to quash?

20 MR. McGAVIN: John McGavin on behalf of Bloomin'  
21 Brands and Outback, Your Honor. This issue that comes  
22 before the Court is our objection and motion to quash a  
23 subpoena served on Nick Seifert yesterday morning.

24 THE COURT: Remind me again. I don't have it right  
25 in front of me. Who is Nick Seifert?

1 MR. McGAVIN: He is a regional manager, regional  
2 executive with Outback Steakhouse, and he owns several and  
3 manages several stores, restaurants, in the Tidewater area,  
4 including the subject restaurant in question.

5 THE COURT: Go ahead.

6 MR. McGAVIN: So Mr. Seifert was previously  
7 deposed. We had no indication that he was on the witness  
8 list that plaintiff was going to subpoena him. We were not  
9 planning on calling him. He really offers no evidence, in  
10 our view, that was significant to what is really a  
11 run-of-the-mill slip and fall case. So yesterday around  
12 10:00 I got a call from him that he'd been served a  
13 subpoena, and he asked the process server, well, since I've  
14 been subpoenaed before in this case, is there a check for  
15 the witness fee and mileage?

16 According to Mr. Seifert, as I put in my papers,  
17 the process server said something to the effect of, I don't  
18 really do this very often, I don't know, but don't worry,  
19 you'll get it.

20 THE COURT: Can you wait just a minute? I'm  
21 looking for something.

22 MR. McGAVIN: Yes, Your Honor.

23 THE COURT: So you said you didn't have notice. So  
24 you didn't have notice ahead of the August 1st conference  
25 because when I did the order, I took everything that we had

1 done and put the witnesses and the exhibits into a final  
2 order that I entered on August 2nd. So it was August 1st  
3 when you first knew he was going to be called?

4 MR. MCGAVIN: No, Your Honor. He had been listed  
5 previously. He's on the list.

6 THE COURT: Right.

7 MR. MCGAVIN: But we did not intend to call him,  
8 and he was not served previously.

9 THE COURT: I just wanted to be sure. So he was on  
10 the list, and he had been served previously?

11 MR. MCGAVIN: For the previous cases, and he had  
12 also been served and given a deposition.

13 THE COURT: Did he return the checks for the  
14 witness fee and the travel?

15 MR. MCGAVIN: Previously, do you mean, Your Honor?

16 THE COURT: Yes.

17 MR. MCGAVIN: No, he did not.

18 THE COURT: Why not? Are you supposed to? This is  
19 an administrative matter. I know that when you serve  
20 someone, process, you have to provide those advance fees.

21 MR. MCGAVIN: I don't know whether he is required  
22 to return those or not, Your Honor. I've never looked into  
23 that.

24 THE COURT: I haven't either.

25 MR. MCGAVIN: But I think the larger issue is

1 serving him with a subpoena the day before, and, again, it's  
2 the same last-minute issue. He had made plans for business  
3 meetings out of the area, and obviously if subpoenaed, and  
4 the Court overrules our objection, he will be here. He will  
5 make himself available. His meetings were up in Richmond,  
6 so he's not far away. I'm not claiming that.

7 But what I'm objecting to is the last-minute nature  
8 of how this has happened, and it seems to me that as this is  
9 unfolding, this case wasn't ready, and there was no effort  
10 to plan in advance. As a further example, Your Honor, the  
11 exhibits for trial were FedExed to my office and arrived  
12 this morning in Fairfax. I don't have the exhibit book  
13 other than what we've put together before the pretrial.

14 So why the plaintiff was FedExing two exhibit books  
15 to my office that arrived this morning, and my secretary  
16 called me at 7:30 to say, "Well, I got a box with two books  
17 with the exhibits." So, as you know, Your Honor, I had an  
18 exhibit book, which I gave to you, and I had my staff create  
19 another one when I went back to the office on Wednesday, and  
20 so I have that. And I don't know if what was sent to me is  
21 any different. But this is what's happening in this case,  
22 and it's very unfair to the defendants to have things being  
23 served the day before. That's not consistent with the  
24 rules, a five-day notice for a witness.

25 THE COURT: That's in the orders, too, it's in the

1 rules, and a lot of these deadlines were in the pretrial  
2 order.

3 MR. MCGAVIN: I understand, Your Honor. So I'm  
4 objecting to this last-minute use of the system, and I don't  
5 even have an actual copy of the affidavit. What I got  
6 was -- he sent it to me. He took a picture of it, and so it  
7 was on my phone. But he didn't have it, he didn't scan it.  
8 He didn't scan it, he took a picture of it and sent it to  
9 me.

10 THE COURT: What is this?

11 MR. MCGAVIN: Mr. Seifert. So simply stated, Your  
12 Honor, this comes too late. It didn't come with the check  
13 and the witness fee, although once -- apparently once the  
14 plaintiff saw my objection, they got a certified check,  
15 which they went over and put on his door about 5:00 last  
16 evening.

17 Then this morning he was out at the gym, and he got  
18 another subpoena for trial, the same one. They served him  
19 this morning again. So this is not County Court. This  
20 isn't General District Court. This is Federal Court with  
21 strict rules, and this is extremely unfair and does not  
22 comply with the rules, and he's not a critical witness in  
23 any event. This is a run-of-the-mill slip and fall. Was  
24 the floor wet? Was it slippery? Did the plaintiff look?  
25 Did she see? Why did she fall? And what is her injury?

1 That's all. This is not a pharmaceutical case on a patent  
2 litigation. We are up to 290 entries in the court file.  
3 Depositions hours upon hours upon hours, multiple motions.

4 So at some point this has to stop, and we are  
5 asking the Court to intervene as we prepare, let's put on  
6 our evidence, whatever evidence there is going to be, and  
7 let's try this case. That's all I have to say on it, Your  
8 Honor. It is pretty straightforward. Thank you.

9 THE COURT: Mr. Haysbert, Mr. McKelvey.

10 MR. HAYSBERT: Your Honor, we attempted to obtain  
11 the deposition of Theresa Siebert in the case, was a  
12 facilities manager for Bloomin' Brands, one of the corporate  
13 defendants.

14 THE COURT: We are talking about Nicholas Seifert.

15 MR. HAYSBERT: I understand. I'm making the  
16 argument. We also attempted to take the person most  
17 knowledgeable deposition of Bloomin' Brands itself, and we  
18 were unable to. Nicholas Seifert is a critical witness in  
19 that he was a joint venture partner for Outback Steakhouse.  
20 Bloomin' Brands is a franchisor of Outback Steakhouse. They  
21 facilitate management decisions through folks like Nicholas  
22 Seifert.

23 THE COURT: Go back again so that I can get the  
24 relationship in my mind.

25 MR. HAYSBERT: Okay.

1 THE COURT: Nicholas Seifert is with which company?

2 MR. HAYSBERT: Outback Steakhouse.

3 THE COURT: Outback Steakhouse.

4 MR. HAYSBERT: Yes. Because Seifert reports to  
5 Jackie Myers, who is the regional vice president.

6 THE COURT: He is with Outback Steakhouse?

7 MR. HAYSBERT: Correct.

8 THE COURT: Go ahead.

9 MR. HAYSBERT: If I could continue with that.

10 THE COURT: Sure.

11 MR. HAYSBERT: She reports to Greg Scarlet, who is  
12 the COO of Outback Steakhouse who reports to a gentleman  
13 named, I believe it was Brett Davis, or something of that  
14 effect, who is the president of Outback Steakhouse, and the  
15 president of Outback Steakhouse reports to executive of  
16 Bloomin' Brands.

17 So the way that Nicholas Seifert, what he testified  
18 to at his deposition was that he corresponds with Bloomin'  
19 Brands whenever there is work that needs to be done at  
20 Outback Steakhouse. The decisions have to be made at a  
21 higher level than him and that those decisions were made  
22 with Bloomin' Brands.

23 When it comes to a determination of whether or not  
24 Bloomin' Brands has any liability in this case, Your Honor,  
25 it's an open question at the moment. They have already



1 admitted that they are the franchisor, but there is the  
2 additional test that we need to meet, and that is whether  
3 they exercise sufficient control over the instrumentalities  
4 of the restaurants, including one instrumentality would be  
5 its floors, so whether or not they exercise control over  
6 when, how the floors got repaired, how they were cleaned, so  
7 on and so forth.

8 Nicholas Seifert is the best person in a position  
9 to establish that Bloomin' Brands was responsible for that  
10 instrumentality. It is his testimony that is critical, Your  
11 Honor, for this case. When I looked through the subpoenas  
12 that we received from defendant, I assumed, because Nicholas  
13 Seifert was on his part of the list, that he would be  
14 bringing him.

15 THE COURT: Please stop right there. You cannot  
16 assume things in litigation and in Federal Court.

17 MR. HAYSBERT: I understand.

18 THE COURT: You just can't assume. They're not  
19 obligated to call him and unless you have an agreement with  
20 them to call him. Did you have an agreement with the  
21 defendant to call him?

22 MR. HAYSBERT: Your Honor, there was no specific  
23 agreement that defendants would call him.

24 THE COURT: Let me just state the rules because all  
25 I'm concerned with is, I want to follow the rules. As I

1 said to you all the other day, the Judge is like a referee.  
2 The Judge calls balls and strikes and follows the rules.  
3 The rules are there in Federal Court. You have the Federal  
4 Rules of Evidence, the Federal Rules of Civil Procedure.  
5 You have local rules. You have a public website that sets  
6 out rules for use of electronic equipment and court  
7 security. It's all there if you look for it.

8 But the bottom line is, they listed him. I'm just  
9 going to repeat what you said. They listed him.

10 MR. HAYSBERT: Yes, Your Honor.

11 THE COURT: But they never gave assurance they  
12 would call him. A party is not required to call any of his  
13 or her witnesses. That's the first thing. If you're going  
14 to call the witness or that you want the witness, you then  
15 become responsible, unless you have an agreement in writing  
16 from the other side or some representation we will produce  
17 that witness for you, you don't need to subpoena them. What  
18 you're telling me is they had it on their list, they decided  
19 not to call, and you didn't have any agreement from them  
20 that they would produce the witness for you.

21 MR. HAYSBERT: That is correct.

22 THE COURT: Is that correct?

23 MR. HAYSBERT: That is correct, Your Honor.

24 THE COURT: So that aside, I'm listening to the  
25 importance of this witness, too.

1 MR. HAYSBERT: Absolutely, Your Honor. So part of  
2 the importance goes back to what I said earlier. We were  
3 not able to let depose Theresa Siebert, we were not able to  
4 get Theresa Siebert to trial, we were not able to depose  
5 Bloomin' Brands. We served a subpoena for Bloomin' Brands  
6 to testify at trial, but we don't know who would show up to  
7 testify on their behalf.

8 So, you know, the best way to establish the  
9 evidence that we have connecting Bloomin' Brands to the  
10 floor is through Nicholas Seifert. In fact, it really is,  
11 other than primary evidence that we could show the Court in  
12 terms of evidence, you know, I feel like part of the exhibit  
13 list goes to just, you know, Bloomin' Brands is on the  
14 insurance documents. So not putting the insurance document  
15 in for the insurance of it but for the fact that we are  
16 establishing or attempting to establish Bloomin' Brands has  
17 control over that instrumentality. So anything that  
18 happened on the floor had to be reported to Bloomin' Brands.

19 So we have this evidence, but then the question  
20 becomes, who do we get it in through? Who has sufficient  
21 connection to Bloomin' Brands to be able to establish that  
22 Bloomin' Brands is also either directly vicariously liable  
23 to what happened to the plaintiff, and Nicholas Seifert is  
24 that person.

25 THE COURT: Well, let me ask you why you would have

1 a subpoena served the day before trial?

2 MR. HAYSBERT: So, Your Honor, I can't really  
3 answer that question. I have a company that serves  
4 subpoenas, and we approached that company to serve subpoenas  
5 for Nicholas Seifert. I can't recall when exactly I did  
6 that, but it can take a few days. It can take three, four  
7 days. Sometimes it can take a week. I can confirm that we  
8 served Deajah Clark, but she -- it took us weeks and months  
9 to find her. So it just happens that way. But, Your Honor,  
10 ultimately we do have Nick Seifert's deposition. So if he's  
11 unable to come to trial, you know, we can always use his  
12 deposition to establish some evidence, but since he won't be  
13 live, he won't be able to be cross-examined.

14 THE COURT: Let me ask you this. You didn't put  
15 out the subpoena until August 4, the same time that you put  
16 out the one to Dr. Haider?

17 MR. HAYSBERT: Yes, we put the subpoena out on  
18 August 4th, Your Honor.

19 THE COURT: That's my question. Why would you wait  
20 until August 4 to subpoena a witness this important?

21 MR. HAYSBERT: Well, what we also did was subpoena  
22 Bloomin' Brands, which is a corporate defendant for trial.  
23 So, in my opinion, was just, you know, if we are unable to  
24 get Bloomin' Brands here at trial, for whatever reason, at  
25 least we depose a person, Nicholas Seifert, who has that

1 connection, and so it's just a way of trying to, you know,  
2 get this evidence in through a witness, and if not able to  
3 do that, then we would have to make our arguments to the  
4 Court on the evidence, which we are happy to do. It just  
5 makes it a lot harder.

6 THE COURT: Thank you.

7 Mr. McGavin, any response?

8 MR. MCGAVIN: Your Honor, I'm unaware of any  
9 subpoena to Bloomin' Brands, and I'm not even sure what that  
10 is. So I don't know what Mr. Haysbert's talking about, and  
11 if that was issued August 4 signed by him and sent down to  
12 Florida, that's not a valid subpoena. So apparently he's  
13 issued some subpoena, signed a subpoena, and sent that to  
14 Bloomin' Brands. I don't know anything about that. But I  
15 believe this was issued August 4, must have been after the  
16 settlement conference or mediation conference, and I believe  
17 it was signed by Mr. Haysbert, just like the others.

18 There is litigation -- well, I won't belabor the  
19 point. It's quite obvious it's last minute, it comes too  
20 late, and does not comply with the rules, and I would ask  
21 that it be quashed. By the way, that doesn't give  
22 Mr. Haysbert the right to read Mr. Seifert's deposition in  
23 because he hasn't approved unavailability. It is  
24 unavailable due to his failure to follow the rules, and  
25 there is no designation of testimony that he might

1 anticipate using. He didn't do a pretrial designation of  
2 deposition testimony. I don't have that. So I don't know  
3 when I'm going to get that, if that was the plan. This is  
4 just last-minute, causing the defense to have to scramble to  
5 respond, whether it's a last-minute motion to have  
6 Dr. Haider appear, to sending me the exhibits at my office  
7 in Fairfax, to issuing a subpoena, and now I've got to file  
8 a brief when I'm in the middle of preparing for witnesses.  
9 This is just -- it's a sharp practice, it's late, and it  
10 forces us to respond and defend, and it doesn't comply with  
11 the rules. Thank you.

12 THE COURT: Well, this is my ruling on quashing the  
13 subpoena. I do agree with Mr. McGavin on a couple of  
14 points. Unavailability has not been shown because the  
15 person is local and is with the company and there has been a  
16 representation that, you know, if required, he can alter his  
17 schedule. So unavailability itself has not been shown. I  
18 would also agree that there has been no proper deposition  
19 designation under our rules at the final pretrial  
20 conference. There has been no such deposition designations.

21 The most, under those circumstance, might be to use  
22 something for impeachment. However, I'm going to deny the  
23 motion to quash because I do find that he is an important  
24 witness. If he was in charge of the Outback, he's with  
25 Outback, and he was employed or in charge of that particular

1 location where Dr. Haysbert fell, and so I am going to rule  
2 that ultimately, although it would be late, that is within  
3 my discretion to allow the late process. It is late. I  
4 just think that because he is local, number one; number two,  
5 he said he can cancel; number three, he's an employee of the  
6 defendant. So the defendant has access to that individual  
7 before trial, and that you've got his deposition, and he  
8 ultimately did receive the appropriate checks. I don't  
9 think they do have to be returned because that's the risk  
10 you run when a case is continued. You lose that subpoena,  
11 and you lose that money. That's what I believe is the case.

12 So, consequently, if anything should be returned,  
13 you can let me know, but I don't think through the clerk  
14 that there is a return of those fees in travel, once the  
15 process server gives it. So I don't think there is any  
16 violation there, I'm not aware of any, and if there is,  
17 someone can let me know, number one; number two, it is late;  
18 but number three, I don't disagree with Mr. McGavin that the  
19 witness isn't important because the witness is with Outback,  
20 and was, I guess, responsible in some ways for that  
21 location. I'll just have to find out because he'll have to  
22 testify.

23 So I agree with what you're saying, Mr. McGavin,  
24 and it's a hard call for the Court, but I do think that, we  
25 need to try this case, and we have the plaintiff. We have

1 her daughter. We have the witnesses that we have, and we  
2 let it go forward and see what happens. So I do deny the  
3 motion to quash.

4 Mr. McGavin, I know that you will see that  
5 Mr. Seifert is available.

6 MR. MCGAVIN: Yes, Your Honor.

7 THE COURT: Thank you. The next question that I  
8 have is, I believe that at the conference last Tuesday, a  
9 week ago on August 1, and then I issued the order on August  
10 2, that at the conference I believe that the ruling on  
11 Filler, is that the name, Dr. Filler?

12 MR. HAYSBERT: Yes, Your Honor, Dr. Filler.

13 THE COURT: The ruling on that exhibit, the  
14 demonstrative was that you were to give the edited version  
15 of that to the Court by noon, and I haven't seen that. That  
16 was the document where he had all the court rulings, and I  
17 ruled, and everybody agreed that you would produce a revised  
18 demonstrative exhibit that you were going to use at trial by  
19 noon Friday, and I haven't seen it. Have you seen it,  
20 Mr. McGavin?

21 MR. MCGAVIN: I don't believe so, Your Honor.

22 THE COURT: Can you address that, Mr. Haysbert?  
23 Also, Mr. McKelvey, you were there.

24 MR. HAYSBERT: Yes, sir, Your Honor, I can address  
25 this.



1 THE COURT: Come up to the podium, please.

2 MR. HAYSBERT: My apologies, Your Honor. So I am  
3 not able to -- because the way that the material came to me,  
4 it came through a PDF -- to delete that information myself  
5 without a special program.

6 So I contacted Dr. Filler's office and asked them  
7 to delete all of the case material and to resubmit it to me.  
8 They have not done so. But I have the ability now with the  
9 trial tech to erase that information and re-submit it to the  
10 Court, if the Court would allow me to. But we don't -- we  
11 didn't have the ability before now.

12 THE COURT: Well, if you can do it now, why  
13 couldn't you have done it then? Explain that.

14 MR. HAYSBERT: I didn't have the technology to do  
15 it, but we have a trial tech here who can do with PDF  
16 documents.

17 THE COURT: Well, you had a trial tech with you  
18 last week. His name was Al, last name started with an H.

19 MR. HAYSBERT: Yes. Al had to return home to where  
20 he's from. There was an emergency. So we got a new trial  
21 tech who come in at the last minute, came in on Monday.

22 THE COURT: Is that trial tech with your firm?

23 MR. HAYSBERT: That trial tech is not with my firm.  
24 He is an independent trial tech. He works through a local  
25 company that is based in Virginia Beach, but he lives

1 himself in Texas.

2 THE COURT: It would have been helpful if you had  
3 at least notified the Court the reason that you couldn't do  
4 it, because when a Court sets a deadline, and I've read all  
5 the reports, I've been trying to prepare diligently for this  
6 trial, and that was an improper exhibit citing other court  
7 cases. I just would have appreciated if you could have at  
8 least notified the Court that you were unable to do it at  
9 this time, that you would have it next week, because I'm not  
10 going to let you use it if we don't have it in advance.  
11 That's the Court's ruling. So when can you get that exhibit  
12 done?

13 MR. HAYSBERT: We will have it done to you today.

14 THE COURT: To the other side, too.

15 MR. HAYSBERT: Of course, Your Honor.

16 THE COURT: Now, I want to ask you one more  
17 question.

18 MR. HAYSBERT: Yes.

19 THE COURT: Why would you Federal Express exhibits  
20 that we all need for trial up to a Fairfax office on the day  
21 of trial? Somebody on your behalf sent them yesterday. You  
22 know the trial starts today. Why would you send them to  
23 somebody's office in Fairfax when you knew the trial was  
24 starting today?

25 MR. HAYSBERT: Your Honor, there is not any real

1 substantial difference between the exhibit list or binder  
2 that we have and what Mr. McGavin has always had. So there  
3 is not really much difference at all. We just decided to  
4 mail the updated one. For example, we took off an Exhibit  
5 4, there was some policy procedure rulings that you made on  
6 that list, and we took that off.

7 The document is still the same. We just made the  
8 change and then re-sent it to him as a courtesy, Your Honor.  
9 I mean, this is something we went through together. He  
10 could have reprinted it himself. We didn't receive, for  
11 example, a new defendant's exhibits after the final status  
12 conference with everything updated in it. We were just  
13 doing it as a courtesy, and then also we served that last  
14 week. I don't know why -- FedEx isn't what it used to be  
15 in -- some things go through FedEx on Friday and not get  
16 there till the next Tuesday. This was supposed to be  
17 overnighted.

18 THE COURT: Where is your FedEx receipt?

19 MR. HAYSBERT: I know we sent it out on Saturday,  
20 Your Honor, for overnight Monday.

21 THE COURT: Where is the receipt, because you check  
22 those things on a receipt.

23 MR. HAYSBERT: Yes, of course. I know.

24 THE COURT: Where is the receipt that you have for  
25 sending it?

1 MR. HAYSBERT: We -- I believe I have it in my  
2 e-mail, Your Honor, and I don't think I have it on paper,  
3 but I could get it.

4 THE COURT: Well, let me see your e-mail.

5 MR. HAYSBERT: Okay. I would have to go get my  
6 phone, Your Honor. But I know that I have -- the reason why  
7 I know is I have two people with me on my trial team who  
8 were with me when I FedExed it on Saturday.

9 THE COURT: I want to see the receipt, please.

10 MR. HAYSBERT: Sure.

11 THE COURT: There is so much going on, and it's  
12 just becoming a nightmare to get this case to trial. The  
13 Court wants to get it to trial.

14 Is this a new exhibit list for defendant's  
15 exhibits? Have you put them in the order that we had in my  
16 final order?

17 MR. MCGAVIN: Yes. They are unchanged. It's the  
18 same. I only have a handful of exhibits, Your Honor.

19 THE COURT: It was confusing, and I found out about  
20 the confusion. The courtroom deputy routinely calls the  
21 attorneys before trial, and particularly if it's a big  
22 document case, but in all trials, they always call and say,  
23 give a final exhibit and witness list so I can check it off  
24 at trial when exhibits are offered, admitted, and so forth.  
25 So it was not the one that you handed me or you all handed

1 me on Tuesday, was not one that had been electronically  
2 filed. That doesn't supersede something that the Court had  
3 done, like Judge Krask's final pretrial and the supplemental  
4 and then my order.

5 That's just the way of the clerk, so as exhibits  
6 come in. In other words, some cases, if it's a construction  
7 case, they may list a thousand exhibits, but they are really  
8 only going to put in 200. So you have to have a list that  
9 you can check off, and you put when submitted, and the same  
10 with when a witness testifies. So that was a request from  
11 the clerk. That's why the Court wasn't aware of it, and the  
12 Court hadn't seen it because it isn't electronically filed.  
13 It is used at court, and then afterwards, with the clerk's  
14 minutes, that may or may not get filed depending upon what  
15 they do. But, in other words, that was the confusion over  
16 that. So what I tried to do was in that one order bring  
17 everything together. Do your numbers comport with the  
18 numbers in my order? That's what I'm asking.

19 MR. MCGAVIN: I believe so, Your Honor. I don't  
20 believe we changed anything. It would be the same exhibits  
21 that the defendant previously offered. We only had a  
22 handful, Your Honor.

23 THE COURT: My law clerk has checked through them  
24 and the clerk. Is it the same as in my order?

25 THE CLERK: Yes, Your Honor.

1 THE COURT: It's the same as was put in my order.  
2 So do you have the defendants' exhibit and witness list?

3 MR. HAYSBERT: I don't have an updated one.

4 THE COURT: This is updated. Do you have it,  
5 Mr. McKelvey?

6 MR. HAYSBERT: I don't have it, Your Honor.

7 THE COURT: I'm asking local counsel, who is  
8 responsible. Do you have it?

9 MR. MCKELVEY: If it was the one sent previously,  
10 then, yes. If it's the one that was sent at the hearing  
11 before the last pretrial -- the last final pretrial, the one  
12 before that, then we have that, I know. If it's been  
13 something sent after that, I haven't.

14 MR. MCGAVIN: These were produced at the pretrial,  
15 Your Honor. In other words, the rule is that we are  
16 supposed to bring the actual exhibits in advance, hard  
17 copies, and that's what I produced.

18 THE COURT: I know. You did have them, but I'm  
19 talking about, I then issued the order on August 2nd.

20 MR. MCGAVIN: Right.

21 THE COURT: Did the numbering comport with that  
22 order?

23 MR. MCGAVIN: Yes. I haven't changed anything.

24 THE COURT: I agree. You had just changed the ones  
25 that had been omitted from the plaintiff, and that's how the

1 numbers got off.

2 MR. MCGAVIN: That's right.

3 THE COURT: They had withdrawn certain exhibits,  
4 and so we had to do a new numbers system for them.

5 MR. MCGAVIN: Yes.

6 THE COURT: Okay. So you have that.

7 MR. MCKELVEY: Can I speak to Mr. McGavin?

8 THE COURT: This is what I'm going to do. I'm  
9 going to take another 15-minute recess, and I'm going to  
10 have you all confer and be sure you are on the same page  
11 with your exhibits.

12 As I understand, this is what the Court has. I  
13 have this right here from the defendants, and I have this  
14 from the plaintiff. Again, I fear to assume, my assumption  
15 is that this comports with my final order that says these  
16 are the exhibits, these are the numbers, so we are all on  
17 the same page for trial. I understand from the clerk that  
18 you may have another exhibit book here, the same as you  
19 FederalExpressed up to Fairfax. I'll let you talk to her,  
20 and we will take a 15-minute recess because we want to get  
21 the exhibits in order.

22 Yes.

23 MR. MCKELVEY: Your Honor, could we perhaps look at  
24 what the Court has and compare to what we have as a group  
25 and so we are all on the same page, both literally and

1 figuratively?

2 THE COURT: Yes. I will leave them with the  
3 courtroom deputy, and she will have to remain while you all  
4 do that.

5 MR. McKELVEY: I understand.

6 THE COURT: If you need a quick five-minute recess  
7 after that, she can let me know when we are ready to come  
8 back in.

9 MR. McKELVEY: Thank you.

10 MR. HAYSBERT: Thank you, Your Honor.

11 THE COURT: Here are the exhibits. Court stands in  
12 recess for approximately 15 minutes.

13 (Recess from 1:19 p.m. to 1:43 p.m.)

14 THE COURT: All the counsel are here, the plaintiff  
15 and the corporate representative.

16 Now, let's go back to where we left off. The first  
17 thing that when we took a recess, you all were going to  
18 check to be sure that you each had copies of the exhibits  
19 that the Court had from defendant and plaintiff.

20 Mr. McKelvey.

21 MR. McKELVEY: Your Honor, I think everything is  
22 good to go.

23 THE COURT: Mr. McGavin?

24 MR. McGAVIN: Your Honor, we are still checking and  
25 comparing it to the exhibit list because the clerk needed to



1 make a photocopy and had to take it, so we had a bit of a  
2 delay to kind of work through that. We are working on it.  
3 We are almost there.

4 THE COURT: Well, let's do a couple of other  
5 things, and then we will get back to that.

6 MR. MCGAVIN: Ms. Blake is going through it now,  
7 Your Honor.

8 THE COURT: Okay.

9 MR. MCGAVIN: Thank you. One thing that we don't  
10 have, there was animations that were supposed to be produced  
11 from Dr. Haider. I don't believe we have those.

12 THE COURT: I think the animation was from  
13 Dr. Filler.

14 MR. MCGAVIN: I believe the animation is  
15 Dr. Haider's animation.

16 MR. HAYSBERT: The animation is for both to use, if  
17 they prefer, but it is an animation.

18 THE COURT: When you talk to the Court, our rules  
19 require that you come up to the podium. The reason for that  
20 is because of the microphones, the size of the courtroom,  
21 and the reverberation. So we are now on the animation. The  
22 Court did receive that, as I recall. So I have received it,  
23 but the defendants didn't. You were going to do it to both  
24 of them.

25 MR. HAYSBERT: That's correct, Your Honor. We have

1 submitted the brain map to them, that animation to them via  
2 mail, FedEx. We also have it on e-mail, as well, that we  
3 can submit it to them as well. I believe that we have  
4 submitted the brain map to them via e-mail as well. You  
5 should have it both.

6 THE COURT: It was a drive.

7 MR. HAYSBERT: Right. The same drive we gave you,  
8 we gave them a flash drive in the mail that they received  
9 apparently today.

10 THE COURT: FedEx today?

11 MR. HAYSBERT: Your Honor, no. It was FedExed last  
12 Saturday for overnight Monday.

13 THE COURT: Do you have those receipts?

14 MR. HAYSBERT: Yes, we do, Your Honor.

15 THE COURT: Then we will do that in a minute. I  
16 believe I got mine on Friday, as I recall. I know I got it  
17 before the weekend because it had to be checked by IT, and  
18 it had to be cleared before it ever came into chambers.  
19 That was done last week.

20 So, again, I don't like using that word. I assumed  
21 you would follow what you said you were going to do at the  
22 conference and send one to the defendants. Why didn't you  
23 just do it at the same time?

24 MR. HAYSBERT: Do?

25 THE COURT: The same time you sent it to the Court,

1 why didn't you send it to the defendant?

2 MR. HAYSBERT: Your Honor, I think it was just the  
3 timing. We had a settlement conference that day, so I think  
4 it was a lot going on that day. However, I know for sure we  
5 did send it out in Saturday mail and received the flash  
6 drive. We will make sure, if they haven't received it,  
7 because it is also online. You can actually click a link on  
8 an e-mail, and it will open up. We had the trial tech do  
9 that, and we will make sure that is available to them in  
10 minutes. We get another break, we will shoot right over to  
11 them. But they should have it, though, by now.

12 THE COURT: I'll let them check. I'll come back to  
13 that in a minute. Now, do you have the FedEx receipts that  
14 when they were sent out and when they were to be delivered?

15 MR. HAYSBERT: Your Honor, if you can give me  
16 another minute.

17 THE COURT: Why did you say you have it?

18 MR. HAYSBERT: We do have it, Your Honor. I just  
19 don't see it in the box I thought it was in, so just a  
20 moment to go retrieve it from the car.

21 THE COURT: I'll sit right here because I will tell  
22 you that you must have a receipt when you FedEx something  
23 for reimbursement, because under the Rules of Professional  
24 Responsibility and under the rules an attorney cannot pay  
25 the cost of litigation. The client has to pay the cost of

1 litigation. You cannot pay the cost of the filing fee. You  
2 cannot pay Federal Express costs, copying, those things.

3 You have to get reimbursed from the client, or if  
4 you're the prevailing party, in certain circumstances, you  
5 can move to get those costs for your client from the party  
6 who doesn't prevail. But you cannot pay the cost of  
7 litigation, and you must have receipts for any expenses that  
8 you've incurred. You have to be reimbursed, and you then  
9 can't waive it under the Rules of Professional  
10 Responsibility and the rules of procedure. So you have to  
11 have receipts for the costs. So find it, please.

12 MR. HAYSBERT: We will do, Your Honor. You want me  
13 to leave?

14 THE COURT: Yes, if you must. I want to see it,  
15 because we've had a lengthy break to sort out exhibits. Now  
16 it turns out that the animation isn't there. Where are you  
17 going? You are leaving court.

18 MR. HAYSBERT: I thought you were asking me to go  
19 and retrieve them for you.

20 THE COURT: I asked you a minute ago, and you said  
21 you had it, then you went looking in a box, and then you  
22 said it wasn't in the box that you thought it was. So now  
23 where are you going?

24 MR. HAYSBERT: I was going to go to the vehicle to  
25 get the receipt for you, Your Honor.

1 THE COURT: If it's on a phone, you can't bring a  
2 phone in.

3 MR. HAYSBERT: I know I can't. But I believe that  
4 it was printed, but I just have to double-check it. And if  
5 it wasn't, then I can verify, I can confirm for you.

6 THE COURT: I want to see the receipt. If you have  
7 to call Federal Express and get a duplicate, I want to see  
8 the receipt.

9 MR. HAYSBERT: I will absolutely do that.

10 THE COURT: Because I have never experienced a case  
11 like this that is so untimely and disorganized and  
12 everything being done at the last minute. I simply have  
13 never experienced this before where everything is being done  
14 at the last minute, and you send trial documents to opposing  
15 counsel by Federal Express that arrives the day of the trial  
16 in Fairfax. I asked you how you did it. You said Federal  
17 Express. Then I assume you made a joke that Federal Express  
18 isn't what it used to be.

19 Then I asked you before the break, I said I wanted  
20 to see the receipt. You have to have receipts for expenses.  
21 You have to be reimbursed one way or the other, either  
22 through your client or through the prevailing party to  
23 opposing party, and you have to have the documents to be  
24 reimbursed. If you win costs, you can't say, well, I did  
25 Federal Express and different costs, whether you got Monday

1 delivery, whether you get a Tuesday delivery, a next day  
2 delivery, a weekend delivery, there are all different costs,  
3 the weight of the package. So now you're going to your car  
4 to get a receipt?

5 MR. HAYSBERT: Yes, Your Honor.

6 THE COURT: All right. I will sit here and wait.

7 MR. HAYSBERT: Okay.

8 THE COURT: It's five minutes to 2:00.

9 Ms. Blake, if you will use this time to continue  
10 checking the exhibits, that will be a good use of the time.

11 MS. BLAKE: I will, Your Honor. It's completely  
12 the same. It is in compliance with this Court's order that  
13 was issued last week. The only thing that's different is  
14 that it looks like they've withdrawn Exhibit 3 because it is  
15 no longer included in the binder.

16 THE COURT: Let me just check that. That would be  
17 excerpts of the National Brain Injury?

18 MS. BLAKE: Yes, Your Honor.

19 THE COURT: It's not in the binder? Mr. McKelvey,  
20 do you know the answer to the question?

21 MR. MCKELVEY: Your Honor, that's where we withdrew  
22 the life care plan portion. Those were the charts for the  
23 life care plan. I believe they were withdrawn.

24 THE COURT: Well, let's wait until Mr. Haysbert  
25 gets back, and let's be sure. We don't want to get in the

1 middle of a jury trial and not know what exhibits are coming  
2 in. Importantly, that an exhibit is coming in that hasn't  
3 been included.

4 MR. MCGAVIN: Your Honor, this is a significant  
5 change to the exhibits.

6 THE COURT: I understand. I remember my ruling,  
7 and I remember putting all this together for that order. I  
8 got it out pretty quickly with us completing a conference at  
9 5:30 or so on Tuesday, and I got that complete order  
10 summarizing everything that had been done. I believe I got  
11 it filed on August 2nd.

12 MR. MCGAVIN: Your Honor, the changes, they have  
13 withdrawn the claim for future medical expenses that  
14 Dr. Haider was going to testify about. That exhibit is  
15 withdrawn.

16 THE COURT: Let's wait for Mr. Haysbert to get back  
17 and see if he and Mr. McKelvey can work it out.

18 Mr. McGavin, I just thought of something. I don't  
19 know if you can contact your office. There should be a  
20 receipt on your Federal Express package, I think, when it  
21 arrives there is a receipt.

22 MR. MCGAVIN: Should be. I don't have a way to  
23 contact them, Your Honor. I'd have to leave the courthouse.

24 THE COURT: I understand that. What I will do is  
25 have my law clerk escort you out of the front door of the

1 courtroom and take you around to my chambers, and you can  
2 use the phone the way Ms. Blake did the other day, if you  
3 can, if you can try to do that.

4 MR. McGAVIN: Sure.

5 THE COURT: If they've got it, it can be e-mailed  
6 to my chambers.

7 MR. McGAVIN: If the law clerk can.

8 THE COURT: Ms. Ruggeri.

9 MR. McGAVIN: Sure. Okay. Which way?

10 THE COURT: Go out the front door of the courtroom  
11 and she will take you.

12 I know you all haven't had lunch. I'm not unaware  
13 of the human need for lunch, for food. If it makes you feel  
14 any better, neither has the Court, the law clerk, the  
15 courtroom deputy, the court security officer, or the court  
16 reporter.

17 MRS. KINNEY [Plaintiff's jury consultant]: Would  
18 it expedite things for the plaintiff if I try to find  
19 Mr. Haysbert, and if he has the receipt by e-mail, that he  
20 should e-mail it to chambers? Because otherwise they will  
21 have to find a printer somewhere. I don't know if he has a  
22 hard copy or not in his car.

23 THE COURT: Let's just wait.

24 (Pause from 2:09 p.m. to 2:15 p.m.)

25 THE COURT: Mr. McGavin and Ms. Ruggeri have



1 returned to the courtroom, and I want to put on the record  
2 that local counsel, Mr. McKelvey, has been here the entire  
3 time. So we have not done anything without the local  
4 counsel here.

5 Do you have a receipt?

6 MR. MCGAVIN: Your Honor, I'm told that the staff  
7 used the same box that arrived and forwarded that box to me  
8 at my hotel. So I don't know if I have a receipt, and the  
9 person who did all that was out at lunch, and they're trying  
10 to go grab her, and I have an e-mail for the Court, and we  
11 will e-mail the information as soon as possible, if we have  
12 it.

13 THE COURT: If you have it. Okay.

14 MR. MCGAVIN: But I don't know the answer.

15 THE COURT: So the box has now been sent overnight  
16 to you in your hotel?

17 MR. MCGAVIN: That's correct, Your Honor.

18 THE COURT: All right.

19 MR. MCGAVIN: Hopefully, I think they wanted to  
20 schedule it, and not familiar with this, but first out.

21 THE COURT: I just know that you have choices, at  
22 least when I've done e-mails myself personally, you have  
23 choices of arrival. I think first out means the first  
24 plane, the first truck or plane that leaves that center  
25 headed your way.

1 MR. MCGAVIN: That's what I asked them to do. But  
2 I'm waiting for one staff person to get back from her lunch.

3 THE COURT: I think the best thing is, we will take  
4 a brief luncheon recess. There are not a lot of places  
5 around here, but there are some. Let's take a brief  
6 luncheon recess. I did comment, and someone on the luncheon  
7 recess can get in touch with Mr. Haysbert and tell him that  
8 lunch, and whether he finds it or not, he needs to be back  
9 here. It's now 2:20, and we will take a luncheon recess  
10 until 3:15. Please contact him and tell him he needs to be  
11 back in court by 3:15, and if not we are just going to  
12 proceed with local counsel to the extent he's able to answer  
13 these questions, and if he can't, I've got a number of  
14 questions. I've got a question about the Bloomin' Brands  
15 subpoena that came up, that I made a note to go back to that  
16 because Mr. McGavin said he wasn't aware of any subpoena,  
17 and I want to see that. I need some information about  
18 Mr. Bingham since he is not with the firm. He is obviously  
19 a private IT person. That's what I understood Mr. Haysbert  
20 to say, he's not with the firm. We have to locate the  
21 animation and where it is, as well as the Federal Express  
22 for the exhibits and the animation. We have to straighten  
23 out this life care plan issue on Plaintiff's 3.

24 I have some questions about Dr. Filler's office  
25 that we need to ask, and the IT person would need to be here

1 probably for that. I think that's everything that I've got  
2 notes on my pad and on some Post-Its. I would also mention  
3 to you, Mr. McKelvey, that somebody better be getting in  
4 touch with these experts that have to have affidavits in  
5 here by tomorrow at 5:00 p.m.

6 So I'm not going to accept the excuse we were in  
7 Court, we couldn't get to it. You've got a firm.  
8 Mr. Haysbert has a firm. There are people here. I can see  
9 them. I don't know who they are, they aren't listed, but  
10 there are two individuals, other than the plaintiff, and you  
11 are with Mr. Haysbert?

12 MR. KINNEY: Yes, we are.

13 THE COURT: I usually have the names. I like to  
14 use people's names. I usually have a sheet.

15 MRS. KINNEY: Sure.

16 THE COURT: You weren't listed on here.

17 MRS. KINNEY: Yes, that's correct. We won't be  
18 participating, but we are jury consultants. Christiane  
19 Kinney.

20 MR. KINNEY: My name is Shawn Kinney.

21 THE COURT: So are you related?

22 MR. KINNEY: We are.

23 MRS. KINNEY: We are married.

24 THE COURT: You are jury consultants?

25 MR. KINNEY: Yes, we are.

1 MRS. KINNEY: I'm an attorney, but in California,  
2 so I won't be participating.

3 THE COURT: Thank you. So we will be in recess  
4 until 3:15. I would let you know that I did release the  
5 jury because I did not want to keep them sitting there while  
6 we sorted out all of these pretrial issues that need to be  
7 sorted out, and they need to eat, too. So it was getting  
8 late, so they were excused around 2:00 p.m. so we are not  
9 holding the jury up.

10 I do want you all to make your phone calls and get  
11 these affidavits underway, because I will not accept the  
12 excuse in the morning that we couldn't get to them. What I  
13 was concerned about, and I may give you five more minutes,  
14 what I was concerned about with Dr. Filler, Mr. Haysbert  
15 said earlier that he had not responded to the request to  
16 edit the document, and that gives the Court concern. If he  
17 didn't respond to the request, has he responded to anything?  
18 I mean, again, I don't want to run into this issue.

19 What was represented earlier, and I wrote it down,  
20 is that he had not responded to the request. So has there  
21 been any follow-up with him that he's going to be here?  
22 Because he has not responded to the request, and so that  
23 gives the Court some concern. I think somebody ought to  
24 follow up on that, Mr. McKelvey.

25 MR. MCKELVEY: Yes, ma'am.

1 THE COURT: The Court will stand in recess until  
2 3:25.

3 (Luncheon recess from 2:23 p.m. to 3:27 p.m.)

4 THE COURT: Everyone is here, attorneys and their  
5 party representatives. Dr. Haysbert can certainly sit at  
6 the table, if she wants. She doesn't have to sit behind the  
7 attorneys. I don't know if she wants to or not.

8 MRS. HAYSBERT: Thank you very much, Your Honor.

9 THE COURT: You are certainly able to sit at the  
10 table, a party if you want.

11 MRS. HAYSBERT: That's all right. Thank you.

12 MR. HAYSBERT: Thank you, Judge.

13 MR. McKELVEY: Your Honor, I think we have made a  
14 little progress since lunch, if I'm allowed to. I've got  
15 the FedEx document from the notebooks. So the notebook and  
16 the demonstrative both were shipped to Mr. McGavin. They  
17 were dropped off on Saturday and didn't arrive still today  
18 or this morning. It shows the chronology of that. We have  
19 confirmed that the notebooks are the same. We just gave  
20 Mr. McGavin a thumb drive of the demonstrative that has the  
21 MP4 on it, the video. I think it has also been e-mailed as  
22 well to Mr. McGavin.

23 We called Dr. Filler's office about the issue, and  
24 they confirmed on the phone at lunch they were coming. We  
25 also have their rental car flight, like an e-mail of those

1 receipts for Dr. Filler. He was under the impression that  
2 he was just going to bring the modified demonstrative with  
3 him as opposed to provide it ahead of time, so that was a  
4 miscommunication on our part. He is going to be providing  
5 that, though, in short order, and we will obviously get that  
6 to everyone as soon as we have it. We requested it.

7 Let's see. The life care plan number 3 was  
8 withdrawn. That's why that was in the exhibit binder.  
9 That's why that was taken out, so we have withdrawn that,  
10 the offering of those exhibits.

11 We are working on those affidavits. Obviously, we  
12 can't get all that to the Court over lunch. But one  
13 question we did have was with regard to the father's medical  
14 records. If we find out that there is a HIPAA issue, since  
15 he's not a party, or he isn't the actual expert, and we are  
16 obtaining those, if the Court would want us to just put that  
17 in the affidavit or how the Court would want us to proceed  
18 in that scenario. If it comes up, we are obviously going to  
19 ask for it, but if it comes up. That was the one question  
20 we had on that ruling.

21 THE COURT: If she's in charge of his life care  
22 plan, and she's making decisions, then she should be able to  
23 sign the form.

24 MR. McKELVEY: Understood. And if something is  
25 weird about that, I guess we will just have to deal with

1 that then with the Court, you know, just whatever comes up.  
2 I'm thinking she can get it. That was an issue that we  
3 thought of at lunch.

4 Then the other thing was the trial tech,  
5 Mr. Bingham, he is with trial -- IN2 Trial, I-N the number 2  
6 and then Trial, and they are out of Virginia Beach, but he  
7 lives in Texas. He's here helping us.

8 THE COURT: Wait. Go back to Mr. Bingham.

9 MR. McKELVEY: Yes, ma'am. He's with IN2 Trial,  
10 and he's the trial tech that's helping us with like the  
11 technology and things of that nature.

12 THE COURT: With IN2, that's the name of the  
13 company?

14 MR. McKELVEY: Yes, ma'am. I-N the number 2 and  
15 then Trial. Yeah, I'm sorry. Then the Bloomin' Brands  
16 subpoena, that was just something that we e-mailed to  
17 Mr. McGavin to, I guess the intent was would he accept it or  
18 not. It was never served, so it's moot. At this point in  
19 the case it's just a moot situation because it was never  
20 served. It was e-mailed to Mr. McGavin.

21 I think the intent behind it was, will he accept it  
22 on the defendants' behalf. Obviously, that's his right, and  
23 obviously, you know, it hadn't been served so it is what it  
24 is, as far as that goes.

25 THE COURT: All right.

1 MR. McKELVEY: I think I have covered everything  
2 other than the affidavits, which were not going to be  
3 able -- I can't get those over lunchtime, but we are going  
4 to work on those. Does the Court have any other questions?

5 THE COURT: I'll go back through each of these.

6 MR. McKELVEY: I wanted to bring the Court up to  
7 speed.

8 THE COURT: Thank you. I've listened, and I think  
9 I've gotten straight, but I've got notes, and I'll go back  
10 through them.

11 MR. McKELVEY: Yes, ma'am.

12 THE COURT: I need a minute. The first thing I  
13 need is to look at the FedEx receipt here. This is not for  
14 the animation? This isn't for the thumb drive, this is just  
15 for the binder?

16 MR. McKELVEY: My understanding is both were sent  
17 in the same package. So there should only be one receipt  
18 for the whole kit and caboodle.

19 THE COURT: So the thumb drive should be in the  
20 package?

21 MR. McKELVEY: Yes, ma'am.

22 THE COURT: Which is coming to you, I think, at  
23 your hotel?

24 MR. McGAVIN: Yes.

25 THE COURT: I'll mention all this later, but I want



1 to check something.

2 MR. McKELVEY: Yes, ma'am.

3 THE COURT: Now, Mr. Haysbert, if you will come up  
4 to the podium. I want to ask you a couple of questions.

5 MR. HAYSBERT: Yes, Your Honor.

6 THE COURT: You said you were present on Saturday  
7 when the package was shipped, and you were there with two  
8 people from your office?

9 MR. HAYSBERT: Yes, Your Honor. I actually -- we  
10 were breaking for lunch, a late lunch, and I went to go mail  
11 the package, and they went to go to the restaurant where we  
12 were going to eat.

13 THE COURT: Where were you on Saturday?

14 MR. HAYSBERT: On Saturday I was in Virginia Beach  
15 close to Regent Law School, and we went to the closest FedEx  
16 to that location, which would have been the one off of  
17 Virginia Beach Boulevard.

18 THE COURT: Okay. Well, there's some discrepancy  
19 here between this travel history and the one that came with  
20 the package, and there could be an explanation for it, but  
21 Mr. McGavin, they had the tracking. They have the tracking  
22 number, and they sent that. It was sent in to my chambers,  
23 and I checked back behind that tracking number to be sure  
24 the information that they had sent was correct, and I got  
25 the same information when I tracked.

1 Now, it indicates that this package originated in  
2 Malibu, California, and that was where the label was created  
3 on Saturday. It's what it says. It says, "Label created  
4 8-5-23, 3:01 p.m. Saturday," and that the package then was  
5 going to Norfolk. They had the package on 8-7-23, and then  
6 it was sent overnight to Herndon, to Fairfax, and it went  
7 through Herndon and was delivered in Fairfax at 8:23, 7-28.  
8 The ship date, it looks like what happened is a label was  
9 created out in California, and somehow was sent here and was  
10 put on a package here.

11 But it shows here that it didn't ship until 8-7-23,  
12 and that at that time it was FedExed first overnight, and it  
13 was to be delivered on 8-8-23, and it was delivered -- it  
14 was to be delivered before 8:00 a.m. and arrived at 7:28  
15 a.m. So I'm trying to compare this. Let me check these  
16 tracking numbers. So how do you explain that?

17 MR. HAYSBERT: Your Honor, what I did personally  
18 was mail the package from the Virginia Beach Boulevard FedEx  
19 location. I don't know where it went from there, but I was  
20 told that it would be overnighted and would arrive at his  
21 office on Monday. That's what I was told there when I  
22 dropped the package off and paid the money. It's out of my  
23 control after that, but I know for sure.

24 THE COURT: Why is it saying that a label  
25 originated in Malibu, California, or at least it was

1 created? It doesn't say it was on a package. It said a  
2 label was created.

3 MR. HAYSBERT: I have no idea. I don't have an  
4 office in Malibu. I don't have any connection in Malibu  
5 except a Post Office Box. Your Honor, I was just given a  
6 note that FedEx labels use master account addresses often.  
7 I don't know if that rings any bell. But why this was  
8 labeled for Malibu.

9 MR. BINGHAM: Your Honor, if I may, as a tech  
10 person. So -- I apologize, but if I make a label in  
11 California, I can then PDF -- I can send it to the person  
12 who actually has a physical package anywhere in the country.  
13 So a master account is what the account is registered to,  
14 and it will be the address that they always associate with,  
15 whatever activity you do on FedEx. I apologize for the  
16 interruption.

17 THE COURT: That's okay. But that's what I'm  
18 assuming from this, is a label was created out there and  
19 then sent here. Then they had the package on 8-7-23 at 4:30  
20 p.m., and then it went to transit overnight. But I'm not  
21 disputing what you're saying. That's what I'm trying to  
22 say, he wasn't in Malibu. Somehow the label was created  
23 there and then sent to Norfolk for the package to be sent,  
24 and then it's sent from Norfolk, this is showing on 8-7-23  
25 at 4:30 p.m. It's in transit and arrives there, as I said,

1 8-8, and then it is says here -- got to check these tracking  
2 numbers. Do you have the tracking number on your travel  
3 history here?

4 MR. HAYSBERT: Yes, Your Honor.

5 THE COURT: Let me check the tracking numbers here.  
6 Let me just take a moment because it's unusual. I was just  
7 looking at your travel history, but let me look at this.  
8 The tracking numbers are the same. It says, "Ship date,  
9 August 7." I'm looking at what you've just given me. This  
10 says, "Recipient, Fairfax, Virginia, U.S., shipper Malibu,  
11 California." This is on what you've given, which is  
12 matching what was taken from the package that arrived. This  
13 says, "Shipper, Malibu, California; recipient, Fairfax,  
14 Virginia." I understand the label was created, and that's  
15 what this says, "Label created."

16 And then the ship date was August 7, 2023, and the  
17 delivery date was August 8, 2023. It says here, "FedEx  
18 overnight." So if you did FedEx overnight, then that would  
19 match this receipt. So, in other words, this matches this,  
20 and then you gave me this receipt. It says, "Scheduled  
21 delivery date," this is the FedEx office receipt, and  
22 whatever day you sent it there, it looks like here, it  
23 wasn't until the 7th. The scheduled delivery date on your  
24 receipt says 8-8-2023. I'm looking at it.

25 MR. HAYSBERT: Your Honor, if I may.

1 THE COURT: Let me finish.

2 MR. HAYSBERT: Sure.

3 THE COURT: Then this track history would comport  
4 because Saturday, and there is a label created, and it's  
5 tendered to the FedEx. You're sending it, shipping the  
6 label from Norfolk. That's what's happening here. It  
7 didn't actually go out until Monday, 8-7-2023. Then it  
8 arrived on Tuesday.

9 Match the travel history with the FedEx receipts  
10 and this receipt. So are you telling me as an officer of  
11 the Court that you did a FedEx package on Saturday for  
12 overnight delivery for Monday, when none of the receipts are  
13 showing that? Are you going to stand there and tell me  
14 that, Mr. Haysbert?

15 MR. HAYSBERT: As an officer of the Court, Your  
16 Honor, I have no problem telling you directly that I shipped  
17 the FedEx package on Saturday at 4:00 p.m. from an address  
18 in Virginia Beach Boulevard at FedEx in Virginia Beach  
19 Boulevard, and that information will be in the documents  
20 that you have in front of you.

21 THE COURT: I'll just put them on record. What  
22 happened is the label is created in California on Saturday.  
23 Then it comes to Virginia Beach Boulevard, and you go and  
24 get the label for the package, or you take the package  
25 there. Yes, I believe the package itself did go from

1 Virginia Beach Boulevard, but this says FedEx first out  
2 overnight, and it is the same tracking number, and it's  
3 addressed to 990 Fairfax Boulevard, John M., scheduled  
4 delivery date 8-8-2023.

5 So if you did overnight delivery, then the latest,  
6 if you did it on Saturday, the latest it would have been  
7 would have been Monday. None of this is saying this, and  
8 you produced these.

9 MR. HAYSBERT: Your Honor, from what I was told by  
10 FedEx.

11 THE COURT: What you were told by FedEx is hearsay  
12 at this point. The documents speak for themselves. You  
13 submitted these documents to me, and they don't comport.  
14 I'm not going to argue about it anymore. They just simply  
15 don't comport with all you've said, and I'll put them both  
16 on record as Court Exhibit Number 1.

17 This is what you have submitted. The first page is  
18 the following, it's the proof of delivery for the tracking  
19 number, and it says starting in Malibu, California, and then  
20 shipping out on August 7, 2023, for a FedEx first overnight  
21 to arrive on August 8, 2023.

22 The second page is a FedEx receipt, and it is from  
23 Virginia Beach, Norfolk location. It's got the transaction  
24 number. It's got a tracking number, the same, and it's got  
25 the recipient and the delivery date, 8-8-2023, and 9792 on a

1 credit card. So what's the date of the charge on the credit  
2 card? I guess it would be out in Malibu?

3 MR. HAYSBERT: No, Your Honor. It would have been  
4 here, and it was August 5th, the date that I mailed the  
5 package.

6 THE COURT: Well, all I can say is that all of  
7 these are showing that it was picked up in Norfolk at 4:30  
8 on Monday, 8-7, and it arrived on Tuesday, next day  
9 delivery. They are basically the same information but in  
10 different formats.

11 MR. HAYSBERT: I also have the credit card receipt  
12 I can give you.

13 THE COURT: I'm just going to leave it at this.  
14 I've asked for the receipts, and all I can do is go by the  
15 receipts here and the tracking record. The one that was  
16 produced by Mr. Haysbert will be Court Exhibit 1 for this  
17 hearing. The one that was produced from the tracking number  
18 on FedEx will be Court Exhibit Number 2.

19 (Court Exhibit 1 received in evidence.)

20 (Court Exhibit 2 received in evidence.)

21 THE COURT: So that finishes the FedEx, and I  
22 appreciate it if you let me know, counsel, either Ms. Blake  
23 or Mr. McGavin, if the thumb drive is in the package,  
24 because I did get an e-mail over lunch from Tammy Armstrong,  
25 and she's our courtroom deputy. Because the thumb drive is

1 coming as an external document, that particular thumb drive  
2 that arrived at the Court has been checked and cleared.

3 So the thumb drive that's got to be used during the  
4 testimony is the one that was sent to the Court and has been  
5 cleared by IT, because I can't download a Dropbox and open  
6 up the Court's computers, the bells and whistles will go  
7 off, even if I open it up with our firewalls. So that's  
8 fine. I ask you to send the actual thumb drive. So the  
9 thumb drive was checked by our IT. The thumb drive has been  
10 cleared, and that's the one that will be used for the  
11 demonstrative exhibit.

12 I've looked at it. I think it's six or seven  
13 minutes, and it's an animation. So that is what will be  
14 shown to the jury, the animation, if admitted or allowed.  
15 So I think that clears up everything on those exhibits that  
16 were FedExed and the thumb drive that you should have. You  
17 can look at it and do what you want with it, but I don't  
18 want any external thumb drives put in any computers that are  
19 here at the court. We are going to use the thumb drive that  
20 I have maintained through the clerk and in my office.

21 MR. MCGAVIN: Your Honor, may I inquire? Counsel  
22 provided me after lunch a thumb drive with the Haider  
23 demonstrative, and just to be clear, I cannot plug that in  
24 in the courthouse.

25 THE COURT: You can do it. You don't have a



1 computer in your hotel room?

2 MR. MCGAVIN: Yes, of course. We do all that  
3 outside the courtroom?

4 THE COURT: Yes. You do all that outside the  
5 courtroom, and if you want -- I can't give you a copy of  
6 what the Court has because it's an animation, so I can't do  
7 that. But, yes, you should view it outside of the  
8 courthouse on your computer, or if you want to give it, I  
9 can have it cleared through IT.

10 MR. MCGAVIN: I will view it, Your Honor, and let  
11 you know if there is an issue.

12 THE COURT: Okay.

13 MR. MCGAVIN: Thank you.

14 MR. HAYSBERT: Just as a final cleanup matter, Your  
15 Honor, because this may come up later, the demonstrative,  
16 the brain animation can be used by both experts, both  
17 experts on the brain, so both can use it, Dr. Haider and  
18 also Dr. Filler.

19 THE COURT: It's listed for both of them, and you  
20 can use it for both of them, if it's ruled okay. It's just  
21 that we will use the one that you sent to the Court.

22 MR. HAYSBERT: Thank you, Your Honor.

23 THE COURT: We were also on the exhibits, and I  
24 want to go to P3. I think that's the one that you have  
25 removed, which was, I believe, the report. It was the life

1 care plan?

2 MR. HAYSBERT: Yes, Your Honor.

3 THE COURT: Of Dr. Haider?

4 MR. HAYSBERT: That's correct, Your Honor.

5 THE COURT: You're not going to present that at  
6 all?

7 MR. HAYSBERT: No, we are not, Your Honor.

8 THE COURT: Are you going to present that  
9 testimony?

10 MR. HAYSBERT: No, Your Honor. In fact, we would  
11 ask the Court -- we can do this on written motion or  
12 orally -- that no information regarding how much money she's  
13 made or what she makes every year, all that stuff would be  
14 irrelevant because we are not asking for future lost wages,  
15 not asking for past lost wages. We are not asking for  
16 future medicals, not asking for past medicals as well.  
17 There are no economic damages that we are going to be  
18 arguing to the jury, and so none of that would be relevant  
19 and should be inadmissible.

20 THE COURT: You would have to file a motion *in*  
21 *limine* because what was argued to the Court, or what I  
22 understand the argument is, that regardless of damages, it  
23 goes to liability. I'm just summarizing. I don't know if  
24 this is exactly what it is, but their argument is that this  
25 is a highly skilled person who remains highly skilled and is

1 in a very distinguished position and is functioning in that  
2 position to the point that her contract has just been  
3 renewed.

4 This is what was represented at the other hearing,  
5 and so wasn't presented to me to rule. But they said at  
6 that hearing that regardless, that they should be able to  
7 say that if she's in a highly paid job, and she's highly  
8 functioning in that job. Now, she may contend otherwise, I  
9 don't know. The plaintiff testifies, and the plaintiff may  
10 contend otherwise. I don't know what her testimony will be,  
11 but that's what they want to cross-examine. They want to  
12 cross-examine on that, as I understand it. So I guess I'll  
13 hear from Mr. McGavin, and then if you want to file a motion  
14 *in limine*, you can.

15 MR. HAYSBERT: We have filed it already, Your  
16 Honor. It is motion *in limine* number 9 regarding financial  
17 condition of the plaintiff.

18 THE COURT: That was ruled on.

19 MR. HAYSBERT: That was reserved.

20 THE COURT: Motion *in limine*, where is it?

21 MR. HAYSBERT: Number 9. It's on the court docket.

22 THE COURT: Why is it in the --

23 MR. HAYSBERT: There were ten motions that were to  
24 be ruled on. Some of them were ruled on, and some were  
25 reserved. There is an order, I believe it is docket number

1 235, that would be the order on the motions *in limine* as  
2 well as document number, I believe, 233 or 238 that would  
3 specify.

4 THE COURT: I hate to have to check behind you, but  
5 I do because at the other conference you were arguing things  
6 that had been resolved, and I kept telling you that, once  
7 it's been resolved through a ruling that has become final in  
8 this case, you can't re-litigate it again here, and we had  
9 to go through that briefly. So I've got a lot of papers.  
10 Do you have the docket there?

11 MR. McKELVEY: Your Honor, I have it.

12 THE COURT: I've got the docket up here.

13 MR. McKELVEY: I have the order where he's talking  
14 about it.

15 THE COURT: 235 is the order.

16 MR. McKELVEY: Yes, ma'am, Page 6, number 8.

17 THE COURT: Let me read the entry, and then I'll  
18 take a look.

19 These are subject to a proper and timely objection  
20 at trial. So you filed the motion *in limine*, and it was  
21 denied without prejudice subject to an objection at trial.  
22 So you have to make an objection to it at trial.

23 MR. HAYSBERT: Your Honor --

24 THE COURT: I don't have the context of how it's  
25 going to come in yet, but it says here that: "The motion *in*

1 *limine* to exclude references to Haysbert's financial  
2 condition was denied without prejudice subject to timely and  
3 proper objection at trial."

4           So I've read this opinion. It's subject to an  
5 objection. You can always forgo an objection. An objection  
6 is not required, but it says here it's without prejudice to  
7 your being able to make an objection. So at trial, if they  
8 try to get it in, and you think it's improper, then you  
9 object and give me the grounds. But I can't rule on it in a  
10 vacuum at this point because it may well be proper  
11 cross-examination depending upon what is asked on direct.

12           So I can't rule on it now because I don't know what  
13 you're going to present. So I have to see if it's subject  
14 to cross-examination or subject to impeachment or whatever  
15 they are planning to do. They may not be planning to make  
16 reference to it. So you've got your objection preserved but  
17 the motion *in limine* has been ruled on. There is no  
18 outstanding motion *in limine* on this.

19           MR. HAYSBERT: Understood. If I may just, Your  
20 Honor.

21           THE COURT: Please just don't belabor.

22           MR. HAYSBERT: I won't belabor, I promise. The  
23 reason why it was denied, obviously I think the Court knows,  
24 is because we had the future lost wage information in the  
25 exhibit list, and so that was what the Court made its

1 decision, it turned on.

2 The other future lost wage exhibit, you have an  
3 economist is going to be testifying regarding her wages and  
4 her damages in the future, depending on what she is making  
5 now, and obviously we were at that time, we are no longer  
6 making that argument because of what lost wages have come  
7 out. The economist is not coming.

8 So that's why we are bringing it up to the Court's  
9 attention again, and will do during trial in case they open  
10 the door to that or attempt to, we will object very  
11 strenuously that that is not something that should come in  
12 because there is no economist, there is no future lost  
13 wages. There is nothing, you know, that -- there is nothing  
14 relevant about bringing up her financial condition, the  
15 amount of money she makes, the exact dollar amount that she  
16 makes for the contract each year. All of that would be  
17 irrelevant and thus inadmissible into evidence.

18 THE COURT: Well, I'll just have to see how it's  
19 offered, because you are claiming any bodily injuries JoAnn  
20 Wright Haysbert sustained, and I'm not saying that I'm going  
21 to give this jury instruction, but you submitted this  
22 instruction on 8-7, which was yesterday, and it says, "You  
23 shall consider any of the following which you believe by the  
24 greater weight of the evidence was caused by the  
25 negligence," and this instruction is Bloomin' Brands, and

1 you've done another set for Outback Steakhouse. But, "One,  
2 any bodily injuries JoAnn Wright Haysbert sustained and  
3 their effect on her health according to their degree and  
4 probable duration." She may be subject to cross-examination  
5 on her health if she continues to work and hasn't suffered  
6 from, you say --

7 MR. HAYSBERT: That's fine, Your Honor.

8 THE COURT: -- and probable duration. I don't  
9 know. I don't know what the testimony is going to be. Then  
10 you've got any physical pain and mental anguish she suffered  
11 in the past and that she may be reasonably expected to  
12 suffer in the future. I don't know if she is going to claim  
13 mental anguish because she can't think as quickly or  
14 something, you said respond as quickly at meetings.

15 Then you've got any disfigurement or deformity or  
16 any associated humiliation or embarrassment. It would  
17 certainly be humiliating and embarrassing if an individual  
18 in her position couldn't function properly, because she's in  
19 a very high position, very respected, and any inconvenience  
20 caused in the past and any that probably will be caused in  
21 the future.

22 I don't know what the testimony is going to be, and  
23 I don't know how it will relate to these damages. So I  
24 don't know if it's going to be proper to ask her about her  
25 position and how she's functioning. I don't know that her

1 financial condition, it's a high functioning position. This  
2 isn't something where you're not required to think. You  
3 have to be pretty sharp to be a provost of a university and  
4 a prominent university.

5 So I don't know if that's what they're going to be  
6 asking or not. You've compared her at the hearings to Ruth  
7 Bader Ginsburg and how bright and quick she is, and so I  
8 just don't know. It's hard to rule on these things when you  
9 haven't heard the evidence. So that's all I'm saying, is  
10 that you make an objection, and I'll rule on it based on the  
11 evidence.

12 MR. HAYSBERT: Thank you, Your Honor.

13 THE COURT: So you're not presenting the life care  
14 plan?

15 MR. HAYSBERT: I am not, Your Honor.

16 THE COURT: Then what are you presenting Dr. Haider  
17 for?

18 MR. HAYSBERT: Dr. Haider is -- she's not only the  
19 neurologist, but she is also a life care planner. She does  
20 both. So the wonderful thing about that is that you get the  
21 person who treats, who examines, who renders opinions about  
22 what she -- what she sees, and she can also create a life  
23 care plan based on that. It's the life care portion that is  
24 not going to be something we will get into.

25 THE COURT: So her life care skills, I'm not



1 questioning those. You're not going to present life care  
2 plan testimony?

3 MR. HAYSBERT: Correct. We are not going to  
4 provide medical costs, we are not going to be talking about  
5 how much it is going to cost for in-home care person. We  
6 are not going to be talking about in-home care person. We  
7 are not going to be talking about a life care plan. We are  
8 not going through all that information, all of that economic  
9 damages, and we are not making that economic damages case.

10 Our case is purely going to turn -- on our economic  
11 damages, as you just read from the jury instructions, the  
12 economic damages are out. So we don't -- and because it's  
13 out, we have to revisit the ruling made at trial -- at the  
14 first final status conference that any medical information,  
15 medical costs information comes in. At this point it's  
16 irrelevant.

17 THE COURT: I know you're not claiming medical  
18 costs. You said that on August 1.

19 MR. HAYSBERT: Yes.

20 THE COURT: Said you weren't claiming any medical  
21 costs or any lost wages at the time up through 2023.

22 MR. HAYSBERT: Right. Past medical costs, we were  
23 saying we are not claiming. Then afterwards we made the  
24 decision that we are going to take out future medical costs.  
25 So future economic damages are now out, as well as the past

1 economic damages -- excuse me -- that we are discussing were  
2 coming out at the time of the final status conference. So  
3 both are now out, no life care plan.

4 THE COURT: So no life care plan, and all of the  
5 economic damages and medical damages are out?

6 MR. HAYSBERT: Correct. Economic damages, the  
7 medical damages, yes, they're out, and we will object if  
8 counsel intends to go into a lot of inquiry that discusses  
9 her cost of care, you know, do you need an in-home care  
10 person. Anything that's in the life care plan, we would  
11 strenuously object to.

12 THE COURT: Well, if you haven't presented that  
13 evidence, then they're not going to be able to ask her are  
14 you going to need this because you haven't presented  
15 evidence that you need it.

16 MR. HAYSBERT: Absolutely.

17 THE COURT: That's one thing. It's another to  
18 present evidence, as you have said, subjective and objective  
19 traumatic brain injury.

20 MR. HAYSBERT: That is correct, Your Honor. That  
21 evidence we will be presenting through Dr. Filler,  
22 especially who will be appearing here at trial and will be  
23 discussing the brain animation, which is based on her actual  
24 tests. You can actually see the brain on pictures that you  
25 will see in the animation. That's why it's animated. So,

1 yes, they will be talking about the physicality of the  
2 injuries that you see on her brain and how it relates to the  
3 fall.

4 THE COURT: Well, I'll hear the evidence, and I'll  
5 make the ruling at that time.

6 MR. HAYSBERT: Thank you, Your Honor.

7 THE COURT: Can you be seated, please?

8 MR. HAYSBERT: Yes.

9 THE COURT: I'm going to ask you, Mr. McGavin, is  
10 there anything further you need clarified about that  
11 exhibit? Because you had asked for clarification on that  
12 before. That's on my list.

13 MR. MCGAVIN: That's correct, Your Honor. So we  
14 will see how the evidence develops and what the plaintiff  
15 tries to put in, but he has maintained throughout that there  
16 is permanent disability for Mrs. Haysbert. So we will see  
17 how it plays out. There is no evidence of disability, and  
18 there is now, particularly in this case, a major causation  
19 issue, which the Court mentioned repeatedly at our pretrial  
20 conference, and just as a preview, Dr. Filler has no  
21 information and clinical correlation to offer an opinion as  
22 to her current condition.

23 His report, as Your Honor I'm sure saw, talks about  
24 she might have, she may have, she would have had. He has  
25 never interviewed her. There is no report of a physical

1 exam, and he is a diagnostician talking about statistical  
2 likelihood. That's why the testimony of Dr. Haider is so  
3 critical and why we believe she should be here to be  
4 cross-examined on this clinical correlation issue. But we  
5 will see how the evidence develops, and I'm certain that we  
6 can present our argument when we get there. Thank you.

7 THE COURT: We have taken care of the life care  
8 plan and the animation. Those were the two exhibit  
9 questions that came up in the last hearing. I'm of the  
10 opinion that they have now been resolved for now.

11 As I understand the Bloomin' Brands's subpoena,  
12 that reference was to something sent to an attorney, and it  
13 was no process for it, and so there is no Bloomin' Brands'  
14 representative that has been subpoenaed for trial.

15 Mr. McKelvey has already represented that to the  
16 Court, and I'm asking him is that what has been represented  
17 to the Court?

18 MR. MCKELVEY: Yes, Your Honor. The subpoena is  
19 moot. What Mr. McGavin does is -- I can't say whether he  
20 will bring somebody or not, but as of right now we don't  
21 have a subpoena issued.

22 THE COURT: That's what I mean because Mr. McGavin  
23 stood up and said he wasn't aware of what Mr. Haysbert was  
24 referring to. You stood up and said we made progress, and  
25 you listed certain things.

1 MR. McKELVEY: Yes, ma'am.

2 THE COURT: I'm just going through now what you've  
3 already represented to the Court so that I know what's  
4 happening, and the issue is there was no proper subpoena  
5 issued for a Bloomin' Brands' representative?

6 MR. McKELVEY: Correct.

7 THE COURT: Thank you. This is a question that I  
8 have. I mentioned that I had dismissed the jury at  
9 approximately 2:00 p.m. I want to know if any counsel or  
10 any representatives of counsel had any contact with any  
11 juror when they were dismissed? If you have, stand up, and  
12 I'll identify you and ask you the appropriate questions.

13 Now, no one stood up, and when I voir dire the  
14 jury, I'm going to ask them if they recognize or know any of  
15 the individuals, after I've introduced you, which you always  
16 do during voir dire, I'll introduce your name and your law  
17 firm, that's the ruling of the Court, and not where you  
18 practice or anything like that. That was in that motion *in*  
19 *limine*. So if anybody thinks they had contact with any  
20 other group of people that were leaving the courthouse, they  
21 need to let the Court know. No one has stood up.

22 I heard what you said about Dr. Filler, is that he  
23 didn't respond to the request because there was some type of  
24 miscommunication, but he's going to be here for trial, and  
25 you are going to get the affidavit?

1 MR. McKELVEY: Yes, Your Honor. We've provided the  
2 Court with a stack, like an e-mail chain that has his travel  
3 arrangements and all as well. That was handed up.

4 THE COURT: Let me do that, because I'll introduce  
5 that. This is the gmail that you handed up?

6 MR. McKELVEY: Yes, ma'am. It should have a chain  
7 with like all that stuff in it.

8 THE COURT: That's fine. This would just be Court  
9 Exhibit Number 3. It's under seal because it has somebody's  
10 future travel plans, and I wouldn't put that on the record  
11 with everything that goes on this day and time.

12 I'll make that Court Exhibit Number 3 under seal.  
13 Thank you.

14 MR. McKELVEY: Thank you.

15 (Court Exhibit 3 received in evidence.)

16 THE COURT: It's good to know his schedule so that  
17 we can try to make the best arrangements we can for him to  
18 testify. I'll allow you to call him out of order, if you  
19 need to, to comport with his travel schedule.

20 MR. HAYSBERT: Thank you, Your Honor.

21 THE COURT: Mr. Bingham, can you come up to the  
22 podium. I'd like to ask you a couple of questions, please.

23 MR. BINGHAM: Sure thing. Yes, Your Honor.

24 THE COURT: Do you have a resume that you can give  
25 to the Court?

1 MR. BINGHAM: I can get one, yes.

2 THE COURT: That would be helpful because since  
3 you're not an attorney admitted, and you're not with one of  
4 the law firms, it would be helpful to have it. I'm not  
5 questioning your skills or your abilities, but it's  
6 something that would be appropriate to have in the Court's  
7 file since I didn't know you were going to be part of the  
8 trial team.

9 MR. BINGHAM: Sure thing.

10 THE COURT: We had another IT person here last  
11 week. Let me mention one thing. I'm not particularly  
12 computer savvy, but I'm not particularly computer  
13 illiterate, either. I'm somewhere in the old age/middle. I  
14 don't think it was that hard for a PDF document to be  
15 changed. You could always drop pages out of it, can't you?

16 MR. BINGHAM: Yes, absolutely. That part is not  
17 hard. Redaction, if you wanted me to take a section out of  
18 a document, that's where it gets complicated, but removing  
19 pages, no problem.

20 THE COURT: And dropping a page that has court  
21 cites, and so forth?

22 MR. BINGHAM: Easy.

23 THE COURT: You will be able to do that if  
24 Dr. Filler, for some reason, doesn't come through with this  
25 exhibit?

1 MR. BINGHAM: No problem.

2 THE COURT: Thank you.

3 I just want to put on the record that I do rely on  
4 the cases that I mentioned. I didn't give full cites, but  
5 the full cites are in ECF Number 285 when I took under  
6 advisement the ruling on Dr. Haider. Both sides have that  
7 document. It was sent immediately yesterday when it was  
8 done by e-mail. It was then given to the defense counsel  
9 this morning, so everybody has that document, and I  
10 mentioned the cases.

11 So rather than go back and cite those cases for the  
12 ruling to withhold the decision on the zoom request, pending  
13 the receipt of further information, and I didn't say I would  
14 grant it on further information, I said pending the receipt  
15 of it, I do rely on those cases cited in ECF Number 285 of  
16 which everyone has a copy, and I mentioned those cases in my  
17 earlier ruling when I took it under advisement and asked for  
18 further information.

19 Now, the last thing here, Mr. Haysbert, is you sent  
20 in yet another electronic device policy request this  
21 morning, and I don't understand why you sent it in since  
22 Mr. McKelvey is local counsel, and he has already been  
23 approved for a laptop and a charging cable. He calls it an  
24 extension cord. This is the same request, so why do you  
25 need this request? It's the same as I've already approved.



1 MR. HAYSBERT: Your Honor, my understanding is  
2 that --

3 THE COURT: Come up to the podium, please.

4 MR. HAYSBERT: Sorry. My understanding is that our  
5 names had to appear, or the people that were going to be  
6 here to do the trial tech information, had to appear on the  
7 document itself. When I looked at the order that the judge  
8 approved for local counsel, my name wasn't on it and neither  
9 was the trial tech member. So I just wanted to make sure  
10 that we completed whatever information was necessary. What  
11 you're saying is only one needed to be provided, then I  
12 would withdraw what I submitted.

13 THE COURT: I just wanted to be sure that you  
14 weren't counting on saying to me tomorrow, you've approved  
15 one for Mr. McKelvey, so now you are approving one for us.  
16 That would not be what I would do. The authorized persons,  
17 I can either write on the other one or I can put on here  
18 supersedes approval of July 27. I think that was the date.

19 MR. HAYSBERT: Yes, it was.

20 THE COURT: Supersedes approval of July 27, and  
21 then I would put on here, "And Mr. McKelvey and Mr. Bingham,  
22 your trial tech." It's very unusual for a Court to approve  
23 a trial tech that's not part of the law firm, but it would  
24 still be for all of you all, one laptop, because that's all  
25 you need. You have the laptop, and I assume that

1 Mr. Bingham will operate that, and then everybody has  
2 screens. That's the way the Court is set up, the Court's  
3 evidence presentation.

4 In other words, the jury will see it as it comes  
5 up, you will see it, counsel will see it, and you ask your  
6 questions. Whoever is examining a witness should not be  
7 operating the computer. You can, but if it holds the Court  
8 up, it's not a good thing for the jury, they don't like  
9 that, but you really only need a presentation device that  
10 brings everything up, and the person examining.

11 You have to get everything on the screen, and so I  
12 would assume that all you're going to need is the laptop  
13 with the charging cable for the three of you. Mr. Bingham  
14 is going to operate it, and you're going to examine, or  
15 Mr. McKelvey will examine the witnesses from what's on the  
16 screen.

17 MR. HAYSBERT: That is correct, Your Honor.

18 THE COURT: Now, as I understand it, through  
19 Mr. Otero, who is in charge of training, that no one from  
20 your team has been trained on the court's system, and that  
21 he reached out to you. I think he was expecting you at 8:30  
22 this morning, and there was no one that showed up.

23 So I have some reservations, and I'm going to tell  
24 you that, if there is delay, you say, oh, my goodness, this  
25 doesn't work, or, oh, my goodness, this doesn't work, you've

1 pretty much missed your opportunity to have your training.  
2 It was supposed to be done a while back, but it has not been  
3 done. Do you have any reason that you haven't done it?

4 MR. HAYSBERT: Your Honor, no. There is no reason  
5 I can -- no excuse I can give you. It hasn't been done, and  
6 I would offer, if it's possible, there might be another  
7 break, five minutes, anytime where he can check out the  
8 equipment with Mr. Otero, we will be grateful for that.

9 THE COURT: I don't know what his schedule is. He  
10 can't drop everything and take care of something that should  
11 have been done that he was here this morning to do. He was  
12 waiting. He came by chambers.

13 MR. HAYSBERT: It should have been done, Your  
14 Honor, and we apologize, and I apologize on behalf of my  
15 team for not being there at the 8:30 call time.

16 THE COURT: I will get this adjusted form in that  
17 says Mr. Haysbert and Mr. McKelvey, counsel, trial counsel  
18 and Mr. Bingham, trial tech, and you will be authorized for  
19 one computer and one charging cable, and IT clearance is not  
20 waived. So IT will check and clear everything and devices  
21 that they put on your devices. If you take them from the  
22 court, they will be checked every day you come to court.  
23 The electronics just don't come into this courthouse.  
24 You've read the electronics policy. That's the last thing I  
25 have, and I'm not aware of anything else that needs to be

1 done.

2 MR. HAYSBERT: I did have one thing, Your Honor.

3 THE COURT: All right.

4 MR. HAYSBERT: I had requested that the Court  
5 provide us with an easel.

6 THE COURT: I think the clerk responded to that. I  
7 believe that you sent those questions in Friday. I think I  
8 mentioned in my reasons yesterday that I said the time you  
9 sent the e-mail in and that the courtroom deputy got back to  
10 you with answers to all of your questions except the  
11 approval of the electronic device form, which the form  
12 didn't actually come in until, what was it, 6:05 a.m. I  
13 think on Monday. So that was all answered. You were told  
14 there was an easel, weren't you?

15 MR. HAYSBERT: I was told, I just didn't see it. I  
16 just wanted to confirm.

17 THE COURT: So there is an easel here, and it will  
18 be available for you.

19 MR. HAYSBERT: Thank you very much, Your Honor.

20 THE COURT: Mr. McKelvey, do you have anything  
21 else?

22 MR. MCKELVEY: No, Your Honor.

23 THE COURT: Anything else from defense counsel?

24 MR. MCGAVIN: No. Thank you, Your Honor.

25 THE COURT: Then when the jury clerk dismissed the

1 jury, she told them to return at 11:00 tomorrow. So you all  
2 be here early to get yourself set up and ready to go because  
3 I plan to bring, and that was one of your questions, the  
4 whole jury panel. Everybody might not show up. There will  
5 be a show cause issued for anybody who doesn't show up, and  
6 they will be subject to, I forgot what it is, I think maybe  
7 it's three days in jail. We do issue a show cause and a  
8 fine. The magistrate judges now do the show cause, but we  
9 do issue those. So I don't know how many people. I think  
10 we've got at least 40 that have been summonsed. So they  
11 will all come in, and we will call the roll, and I will  
12 conduct the voir dire. That was one of your questions. The  
13 judges conduct the voir dire in this court.

14 I have a system where I will never impanel a jury  
15 until I've given everybody an opportunity. So don't jump up  
16 and say I have an objection because I will always say, is  
17 there any objection to the Court's voir dire so far? I will  
18 ask you all that, and then we will perhaps send the jury out  
19 and go through cause. I will never not give you a chance to  
20 object.

21 In the end, before I impanel the jury, it's the  
22 last thing that I'm going to ask you. I'm aware of your  
23 *Batson* motion. You've asked that. So you don't need to  
24 worry about preserving your objection when I ask a question.  
25 I will ask, and then you will have an opportunity to object.

1 I'll ask if you have anything else you want the Court to  
2 inquire of. I'll go through all of that. So don't worry  
3 about having your opportunity, because I try to be pretty  
4 meticulous in doing it and giving everybody an opportunity  
5 to respond.

6 If there is nothing further, then the Court stands  
7 in recess until 11:00 a.m. tomorrow morning.

8 (Hearing adjourned at 4:27 p.m.)

9 CERTIFICATION

10  
11 I certify that the foregoing is a correct transcript  
12 from the record of proceedings in the above-entitled matter.

13  
14  
15 X \_\_\_\_\_/s/ \_\_\_\_\_ X

16 Jody A. Stewart

17 X \_\_\_\_\_ 8-22-2023 \_\_\_\_\_ X

18 Date  
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